

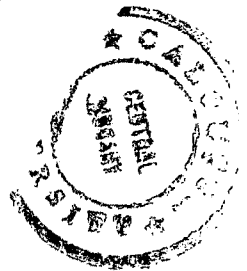
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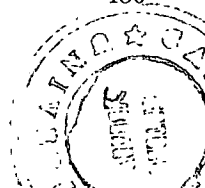
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THE MEANING AND REACH OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

By Theodor Meron*

I. INTRODUCTION

The International Convention on the Elimination of All Forms of Racial Discrimination¹ (the Convention) is the most important of the general instruments (as distinguished from specialized instruments such as those pertaining to labor or education) that develop the fundamental norm of the United Nations Charter—by now accepted into the corpus of customary international law—requiring respect for and observance of human rights and fundamental freedoms for all, without distinction as to race.² It has been eloquently described as “the international community’s only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation.”³

The chain of events that ultimately led to the preparation and adoption of the Convention originated with swastika painting and additional “manifestations of anti-semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature” in 1959–1960.⁴ But an explicit reference to anti-Semitism was not included in the Convention as adopted.⁵ Nor does it mention other specific forms of racism, except for apartheid, which is addressed in Article 3, as well as in the

* Of the Board of Editors. I note in gratitude the outstanding help of my research assistant, Donna J. Sullivan, NYU '85. Research for this article was supported by the NYU Law Center Foundation.

¹ 660 UNTS 195, reprinted in 5 ILM 352 (1966).

² On the status of this norm as customary law, see RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 (Tent. Draft No. 3, 1982).

Regarding human rights instruments on discrimination, see generally Marie, *International Instruments relating to Human Rights: Classification and Chart Showing Ratifications as of 1 January 1984*, 4 HUMAN RTS. L.J. 503, 522–24 (1984).

³ 33 UN GAOR Supp. (No. 18) at 108, 109, UN Doc. A/33/18 (1978) (statement by the Committee on the Elimination of Racial Discrimination at the World Conference to Combat Racism and Racial Discrimination).

⁴ Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 997 (1966); N. LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 1 (1980). On the preparatory work of the Convention, see generally Schwelb, *supra*, at 997–1000; N. LERNER, *supra*, at 1–6; 2 REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS, UN Doc. ST/LEG/SER.B/21, at 70–72 (prov. ed. 1982).

⁵ For the background, see N. LERNER, *supra* note 4, at 2, 68–73; Schwelb, *supra* note 4, at 1011–15.

Preamble. Nevertheless, anti-Semitism may be regarded as encompassed by the general prohibitions of racial discrimination stated in the Convention.⁶ Although expressions of discrimination on ethnic grounds and on religious grounds are sometimes closely related,⁷ the Convention does not prohibit religious discrimination. The intention, of course, was to make it the subject of separate instruments.⁸

The Convention drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against black and other nonwhite persons. Because of the strong political support of the African, Asian and other developing states, top priority was given to the Convention by the organs involved in its preparation, i.e., the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, the Economic and Social Council (ECOSOC) and the Third (Social, Humanitarian and Cultural Questions) Committee of the General Assembly. Although the Sub-Commission began working on it only in January 1964, the Convention was adopted with record speed on December 21, 1965 and entered into force on January 4, 1969.⁹ It has been ratified by more states¹⁰ than any other human rights treaty except the Geneva Conventions of August 12, 1949 for the Protection of Victims of War.¹¹

The Convention was signed on behalf of the United States on September 28, 1966. On February 23, 1978, it was transmitted by President Carter to the Senate for advice and consent to ratification, with far-reaching reservations, declarations and understandings.¹² These reservations, declarations and understandings have been the subject of considerable discussion¹³ and will not be addressed, in detail, in this study. The Senate

⁶ Schwelb, *supra* note 4, at 1014-15; N. LERNER, *supra* note 4, at 72.

⁷ See text accompanying notes 104-106 *infra*.

⁸ The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted by the UN General Assembly on Nov. 25, 1981, by Res. 36/55, 36 UN GAOR Supp. (No. 51) at 171, UN Doc. A/36/51 (1981). A convention on the subject is still far from completion.

⁹ MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1981, at 96, UN Doc. ST/LEG/SER.E/1 (1982).

¹⁰ A total of 124 states. 39 UN GAOR Supp. (No. 18) at 1, UN Doc. A/39/18 (1984).

¹¹ A total of 160 states. INT'L REV. RED CROSS, No. 242, Sept.-Oct. 1984, at 274.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

¹² 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 440-46 [hereinafter cited as U.S. DIGEST]; Contemporary Practice, 72 AJIL 620, 621-22 (1978).

¹³ See, e.g., *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. (1980).

Committee on Foreign Relations has not yet reported the Convention out and is not now actively considering it. Nonetheless, the principle of law stated in Article 18 of the Vienna Convention on the Law of Treaties¹⁴ obligates the United States not to defeat the object and purpose of the Convention prior to its entry into force for the United States.

The annual reports of the control organ established under Article 8 of the Convention—the Committee on the Elimination of Racial Discrimination (the Committee)—other documents of the Committee, the individual comments made by members of the Committee and its practice and jurisprudence provide ample material for critical studies of the Convention and for assessing how well its object and purpose are being served.

The Committee's functions may be divided into three different categories. First, and most important for this study, the examination of reports from state parties and the submission of annual reports to the General Assembly under Article 9. Such reports may include "suggestions and general recommendations based on the examination of the reports and information received from States Parties." Second, the consideration of complaints submitted by one state party against another and alleging violation of the Convention, under Articles 11–13. This function of the Committee will not be discussed in this study. Third, the consideration of individual communications under Article 14, which will be mentioned in part VII below.

Under Article 22 of the Convention, any disputes between state parties over the interpretation or application of the Convention that are not settled by negotiation or by Convention procedures or referred to another mode of settlement may be submitted to the International Court of Justice for decision at the request of any party to the dispute. So far, no such dispute has been referred to the Court. While the Committee has not been given general competence to interpret the Convention, as a treaty organ, the Committee may be competent to interpret the Convention insofar as is required for the performance of the Committee's functions.¹⁵ Such an interpretation per se is not binding on state parties, but it affects their reporting obligations and their internal and external behavior. It shapes the practice of states in applying the Convention and may establish and reflect their agreement regarding its interpretation.¹⁶ Whether a particular interpretation or decision by the Committee serves such a function can, of course, be determined only *in concreto*.

The object of this study is to analyze and interpret some key provisions of the Convention—considerations of space compel selectivity—with at-

¹⁴ *Opened for signature* May 23, 1969, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969). See generally I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 39 (1973); *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* §314 (Tent. Draft No. 1, 1980).

¹⁵ For a discussion of this question, see 28 UN GAOR Supp. (No. 18), paras. 46–48, UN Doc. A/9018 (1973).

¹⁶ See Vienna Convention on the Law of Treaties, *supra* note 14, Art. 31.

tention to problems of their reach that have not been discussed in depth in the literature.¹⁷ Beyond the Convention itself, the study may throw some light on the quality of human rights lawmaking in the United Nations.

II. DEFINING DISCRIMINATION: PURPOSE AND EFFECT

Article 1(1) defines racial discrimination as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Unlike Article 2(1) of the International Covenant on Civil and Political Rights (Political Covenant), which only addresses distinctions in the enjoyment of the rights recognized by the Covenant, Article 1(1) extends to all human rights and fundamental freedoms, whatever their source.

This definition of racial discrimination is different from the statement of the right to equality before the law, which appears in Article 5 of the Convention, but the notion of equality before the law must be taken into account in interpreting the definition. It has been suggested that equality and nondiscrimination can be seen as affirmative and negative statements of the same principle.¹⁸ But what does "equality" mean? In the U.S. fair employment laws, there is tension between equality in the sense of equal treatment (obligation of means) and equality in the sense of equal achievement (obligation of result).¹⁹ The goal of equal achievement, of course,

¹⁷ There is an extensive literature on the Convention. See generally Vincent-Daviss, *Human Rights Law: A Research Guide to the Literature—Part I: International Law and the United Nations*, 14 N.Y.U. J. INT'L L. & POL. 209, 278–80 (1981); W. MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* (1983); N. LERNER, *supra* note 4; Schwelb, *supra* note 4; Greenberg, *Race, Sex, and Religious Discrimination in International Law*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 307 (T. Meron ed. 1984); Buergenthal, *Implementing the UN Racial Convention*, 12 TEX. INT'L L.J. 187 (1977); Partsch, *Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights*, 14 TEX. INT'L L.J. 191 (1979); J. Inglés, *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. A/CONF.119/10 (1983). Regarding the conformity of U.S. law with the Convention, see particularly N. NATHANSON & E. SCHWELB, *THE UNITED STATES AND THE UNITED NATIONS TREATY ON RACIAL DISCRIMINATION: A REPORT FOR THE PANEL ON INTERNATIONAL HUMAN RIGHTS LAW AND ITS IMPLEMENTATION* (The American Society of International Law 1975). See generally H. Santa Cruz, *Racial Discrimination*, UN Doc. E/CN.4/Sub.2/370/Rev.1 (1977).

¹⁸ Ramcharan, *Equality and Nondiscrimination*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 246, 252 (L. Henkin ed. 1981).

The notions of nondiscrimination and equality before the law were addressed by the Human Rights Committee in a case of discrimination on grounds of sex submitted under the Optional Protocol to the International Covenant on Civil and Political Rights. Communication No. R. 9/35, *Shirin Aumeeruddy-Cziffra v. Mauritius*, 36 GAOR Supp. (No. 40) at 134, UN Doc. A/36/40 (1981).

¹⁹ Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237–38 (1971).

has a redistributive quality.²⁰ In a major policy statement, the Committee itself has explained that "[b]oth of these obligations [the obligation regulating the behavior of the state and public authorities, institutions and officials, whether national or local, and the prohibition of discriminatory conduct by any person or group against another] aim at guaranteeing the right of everyone to equality before the law in the enjoyment of fundamental human rights, without distinction as to race, colour, descent or national or ethnic origin, and at ensuring that that equality is actually enjoyed in practice."²¹ The Committee thus appears to regard equality of result as the principal object of the Convention. That goal is reflected in several provisions of the Convention (e.g., Arts. 1(4) and 2(1)(c)) but is not explicitly stated in its definition of racial discrimination. The definition poses special problems because of the proviso limiting the prohibited distinctions to those leading to the denial or the impairment of human rights on an equal footing.²²

Purposeful discrimination and discrimination that is the effect, or consequence, of actions undertaken for a nondiscriminatory reason are evinced by facts of a different nature. When distinctions are made on the explicit basis of race, a violation of the Convention can often be established without great difficulty, since the discriminatory purpose may be apparent on the face of the instrument, policy or program in question. Establishing the existence of discriminatory effect,²³ however, may require information of appreciable specificity and breadth, especially where effect is observable only over time.²⁴ An authoritative commentator has described purpose as the subjective test, and effect as the objective test of discrimination, implying perhaps that the latter is more easily applied.²⁵ Yet, depending upon the quantity and the quality of the data required, discriminatory effect may be very difficult to establish, e.g., when it is attributed to the impact of economic policies and practices on ethnic groups that are already economically disadvantaged, or when the discriminatory aspects of social and cultural practices may be explained by other factors (such as religion). Information sufficiently detailed to support findings of violations in such cases will not always be available.

When egregiously racist practices are involved, these questions concerning proof are primarily of academic interest. However, the distinction

²⁰ *Id.* at 244.

²¹ 33 UN GAOR Supp. (No. 18) at 108, 110, UN Doc. A/33/18 (1978).

²² Schwelb, *supra* note 4, at 1001.

²³ Section 1607.3 of the Uniform Guidelines on Employee Selection Procedures of the U.S. Equal Employment Opportunities Commission (EEOC) states that the use of any selection procedure that has an adverse impact on the hiring, promotion or other employment opportunities of members of any race, sex or ethnic group will be considered to be discriminatory, unless certain conditions have been met. 29 C.F.R. §153 (rev. July 1, 1983).

²⁴ Section 1607.4 of the EEOC Uniform Guidelines, *supra* note 23, provides that where the user has not maintained data on adverse impact of a selection process, the federal enforcement agencies may draw an inference of adverse impact from that failure. *Id.* at 154-55.

²⁵ N. LERNER, *supra* note 4, at 30-31.

between purpose and effect presents a basic question: is the Convention addressed to unintentional, as well as to intentional, acts of discrimination? It has been suggested that the drafters of the Convention wished to prohibit only racially motivated discrimination.²⁶ The word "effect" may thus bring actions for which discriminatory purpose could not be established within the scope of the Convention by allowing the inference of purpose from effect;²⁷ consequences may be probative of an actor's intent.²⁸ This is of particular importance where subtle discriminatory purpose is not apparent on the face of statutes, policies or programs.

That the goal of de facto equality is central to the interpretation of the Convention is supported by references in the Preamble to enjoyment of certain rights "without distinction of any kind"²⁹ and to "discrimination between human beings on the grounds of race,"³⁰ as well as by the reference in Article 5 to the right to equality before the law. Moreover, the phrase "on an equal footing" in Article 1(1), considered in conjunction with the exception created in Article 1(4) allowing distinctions for the purpose of affirmative action, "to ensure . . . groups or individuals equal enjoyment or exercise of human rights," and the obligation imposed by Article 2(2) to take certain affirmative action indicate that the Convention promotes racial equality, not merely color-neutral values, "not only *de jure* . . . but also *de facto* equality . . . designed to allow the various ethnic, racial and national groups the same social development."³¹ Of particular

²⁶ *Id.* at 28.

²⁷ Greenberg observes:

The use of the standards of "purpose" and "effect" anticipated the full-blown controversy in the U.S. law of racial discrimination which became important after the U.S. Supreme Court decision in *Washington v. Davis* [426 U.S. 229 (1978)], that mere discriminatory effect without the *purpose* of discriminating does not violate the Constitution. Some statutes, however, have been held to forbid discriminatory *effect* [e.g., *Board of Education of the City of New York v. Harris*, 444 U.S. 130 (1979)]. One may speculate whether the Racial Discrimination Convention, had it been in force in the United States at the time *Washington v. Davis* was decided, would have brought about a different result.

Greenberg, *supra* note 17, at 322.

See also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

For a major U.S. example of legislation based on the purpose or effect of racial discrimination, see Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) (1982). In *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), the Supreme Court stated: "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (emphasis by Court).

²⁸ See Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 Nw. U.L. REV. 907, 956-57 (1967). Regarding the relevance of effect to the determination of purpose, see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). The Supreme Court stated that determining whether invidious discriminatory purpose was a motivating factor demanded a sensitive inquiry. "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* at 266.

²⁹ Preamble, para. 2. Regarding reference to a preamble to interpret a treaty, see Vienna Convention on the Law of Treaties, *supra* note 14, Art. 31(1)-(2).

³⁰ Preamble, para. 7.

³¹ 37 UN GAOR Supp. (No. 18), para. 468, UN Doc. A/37/18 (1982).

importance in this context is Article 2(1)(c), which requires states to take policy measures and to amend, rescind or nullify any laws or regulations that have the effect of creating or *perpetuating* racial discrimination.

Past acts of discrimination³² have created systemic patterns of discrimination in many societies. The present effects of past discrimination may be continued or even exacerbated by facially neutral policies or practices that, though not purposely discriminatory, perpetuate the consequences of prior, often intentional, discrimination. For example, when unnecessarily rigorous educational qualifications are prescribed for jobs, members of racial groups who were denied access to education in the past may be denied employment. Because the objective of the Convention is the attainment of equality, facially neutral policies or practices that have a disparate impact on some racial groups should be prohibited, despite the absence of discriminatory motive.³³ The prohibition against practices that have a discriminatory effect or impact imposes an obligation upon states that may be more difficult to respect than the obligation to prohibit purposeful discrimination. States may fulfill the latter obligation but still violate the Convention by failing to comply with the requirements of the former. While in U.S. law effect is often taken into account in establishing purposeful discrimination, and the redistributive equal achievement goal "is not to be pursued without restraint,"³⁴ the Convention appears to prohibit discriminatory effect independently of the notion of intent. We shall return to the notion of intent in section IV below.

Primarily with regard to measures to ensure the development and protection of certain racial groups does the Convention, in Article 2(2), permit the obligation to be carried out "when the circumstances so warrant," leaving a certain measure of discretion to the state. These measures will be further considered in section V below. Discretion is also recognized in Article 1(4), which excludes from the definition of racial discrimination such affirmative action measures "as may be necessary." Other provisions of the Convention, such as Article 2(1)(c), obligate the state to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists," without leaving it a wide margin of discretion.

Thus, the Convention states far-reaching and burdensome obligations. Could it be argued, for example, that general fiscal or social policies that

³² Greenberg, *supra* note 17, at 313, notes the view permitting affirmative action to compensate disadvantaged groups for past discrimination.

³³ In discussing Title VII of the Civil Rights Act of 1964, *supra* note 27, the Supreme Court stated that the Act was

to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs v. Duke Power Co., 401 U.S. at 429-30.

³⁴ Fiss, *supra* note 19, at 297.

have the effect, though not the intent, of perpetuating the disadvantaged position of certain racial groups must be changed without delay, whatever the cost and without regard to competing priorities? The Convention does not indicate that states can invoke a range of considerations to justify failure to take immediate steps towards implementing the equal achievement goal and can balance that goal with other desired community goals.

By defining discrimination as various prohibited distinctions that cause nullification or impairment of the recognition, enjoyment or exercise, *on an equal footing*, of human rights, Article 1 creates certain problems. Would this wording support the contention that the "separate but equal" doctrine is consistent with the Convention? One could respond, of course, that separate facilities are never entirely equal and that they do not permit enjoyment of human rights on an equal footing. On another level, intangible considerations, such as the feeling of inferiority or the stigma that attaches to separate facilities for minority groups, are sufficient to render separate facilities and services unequal, or even inherently unequal.³⁵ The notion of equality advocated by the Convention, the concept of affirmative action, the preambular references to distinction and discrimination on grounds of race, the reference to the right to equality before the law in Article 5 and the prohibition in Article 1(4) of the maintenance of separate rights for different racial groups after the objectives for which they were conferred have been achieved, all militate in favor of denial of the "separate but equal" doctrine. But the text fails to make this prohibition fully explicit.

The goal of affirmative action could have been assured through different wording. Article 2 of the Universal Declaration of Human Rights,³⁶ which states that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, largely avoids this difficulty.³⁷ In practice, the problem has not been troublesome because members of the Committee appear to have treated distinctions on grounds

³⁵ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

³⁶ GA Res. 217A, UN Doc. A/810, at 71 (1948) [hereinafter cited as Universal Declaration]. See also Art. 2 of the International Covenant on Economic, Social and Cultural Rights (Economic Covenant), GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); Art. 2 of the International Covenant on Civil and Political Rights (Political Covenant), *id.* at 52. Article 2 of the Economic Covenant employs the term "discrimination," while Article 2 of the Political Covenant employs the term "distinction." The use of the word "discrimination" in the Economic Covenant was apparently intended to allow for preferential treatment of underprivileged groups. Ramcharan, *supra* note 18, at 258-59.

³⁷ Ramcharan observes that during the drafting of the Covenants, references to equality, equality before the law, equal protection of the law, nondiscrimination and nondistinction were used interchangeably. Ramcharan, *supra* note 18, at 251.

On equality before the law as a basic human right, see Partsch, *supra* note 17, at 196; Lillich, *Civil Rights*, in 1 Meron (ed.), *supra* note 17, at 115, 132-33. For a comparison of the concept of equality in the U.S. Constitution and international human rights instruments, see Henkin, *International Human Rights and Rights in the United States*, in *id.* at 25, 41-43. Regarding the definition of racial discrimination in other human rights instruments, see N. LERNER, *supra* note 4, at 31-32.

of race as suspect³⁸ (except when justified in the context of affirmative action), without engaging in a serious inquiry into whether a particular distinction has the purpose or the effect of denying or impairing the enjoyment of human rights on an equal footing. Perhaps the Committee has been suggesting that distinctions on grounds of race constitute racial discrimination *per se*. Thus, the "common law" of the Convention is based on the notion of equality, rather than on its definition of racial discrimination. This "common law" has been developed by the Committee without any in-depth discussion of problems of interpretation or of the discrepancy between the definitional article of the Convention (Art. 1) and some of the operative provisions. This discrepancy was caused, at least in part, by the fact that the definitional article was drafted first,³⁹ and was not adjusted to the operative provisions after they were prepared.

Distinctions made on the basis of race may be dangerous and subject to abuse for purposes of discrimination. "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category."⁴⁰ It would have been preferable, therefore, if the Convention had prohibited distinctions made on the basis of race, except in the context of affirmative action, without requiring a showing of their adverse effect on the enjoyment of human rights. The U.S. Supreme Court subjects the classification of persons according to their race to the most exacting scrutiny.⁴¹ While the Court has not ruled that all racial classification is inherently impermissible, it has moved in that direction (outside the context of affirmative action).⁴²

III. PUBLIC AND PRIVATE REACH?

Whether the provisions of the Convention apply not only to public, but also to private, or partly private, action presents particular difficulties of interpretation. Article 1(1) defines racial discrimination as certain distinctions "in the political, economic, social, cultural or any other field of *public life*" (emphasis added). This suggests that only public action is targeted by the Convention, including the activities of organizations that, though legally autonomous, perform functions of a public nature.⁴³ But without explicitly addressing the possible conflict with Article 1(1), Article 2(1)(d) obligates state parties to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." The latter provision has

³⁸ See, e.g., 38 UN GAOR Supp. (No. 18), paras. 168, 193, 280, UN Doc. A/38/18 (1983).

³⁹ Schwelb, *supra* note 4, at 1005.

⁴⁰ *Palmore v. Sidoti*, 104 S.Ct. 1879, 1882 (1984).

⁴¹ *Id.*

⁴² The Court decided, on the basis of the Equal Protection Clause of the Fourteenth Amendment, that "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody." *Id.* (footnote omitted).

⁴³ N. LERNER, *supra* note 4, at 37 (in the context of Art. 2).

been described as "the most important and most far-reaching of all substantive provisions of the Convention."⁴⁴ Interpreted in the context of Article 1(1), Article 2(1)(d) appears to mean that racially discriminatory action that occurs in public life is prohibited even if it is taken by any person, group or organization.⁴⁵ But how does one determine what "public life" is? To which areas does the prohibition of discrimination apply? When does the duty to accord equal treatment prevail?

The Committee itself stated that the national policies of state parties "must have as their aim the elimination of racial discrimination in all its forms—whether practised by public authorities, institutions or officials or by private individuals, groups or organizations"⁴⁶ and that they "must entail the prohibition and the termination, by all appropriate means, of acts of racial discrimination perpetrated by any person or group against another."⁴⁷ In this context, the Committee emphasized the obligation of all state parties, in accordance with Article 6 of the Convention, to assure to everyone within their jurisdiction effective protection from and remedies for any acts of racial discrimination, including remedies for discriminatory acts by any person or group. But the Committee did not establish any parameters for the activities encompassed by the prohibition on discriminatory treatment. If the Convention goes beyond governmental action to embrace discriminatory action by nongovernmental, private parties, what is the substantive area of public life that is covered or, conversely, of private life that is beyond the Convention's reach?⁴⁸ The problem of determining the reach of provisions prohibiting discrimination when nongovernmental actors are involved arises also with regard to other human rights instruments, including Article 26 of the Political Covenant,⁴⁹

⁴⁴ Schwelb, *supra* note 4, at 1017.

⁴⁵ It may be noted that the Carter administration proposed an understanding to Article 2(1) and to a number of other provisions stating that its obligations to enact legislation extended only to "governmental or government-assisted activities and to private activities required to be available on a nondiscriminatory basis as defined by the Constitution and laws of the United States." 1978 U.S. DIGEST, *supra* note 12, at 443; 72 AJIL at 622.

⁴⁶ 33 UN GAOR Supp. (No. 18) at 109, UN Doc. A/33/18 (1978).

⁴⁷ *Id.* at 110.

⁴⁸ One member of the Committee, noting that the Race Relations Act of Great Britain "did not apply to personal and intimate relationships, said that it introduced a dangerous degree of flexibility which almost amounted to authorizing discrimination." 38 UN GAOR Supp. (No. 18), para. 164, UN Doc. A/38/18 (1983). The British representative replied that such exceptions were necessary "in the interest of striking a balance between individual freedoms and government restrictions." *Id.*, para. 172.

⁴⁹ Australia's acceptance of Article 26 "on the basis that the object of the provision is to confirm the right of each person to equal treatment in the application of the law" (MULTILATERAL TREATIES, *supra* note 9, at 119) brought about an interesting exchange between the representative of Australia and some members of the Human Rights Committee established under Article 28 of the Political Covenant. Some members of the Committee argued that Australia's interpretation of Article 26 was not correct, that the article provided not only for equality of all before the law, but also for equal protection of all by the law against any discrimination. One member of the Committee disagreed and maintained that the article was concerned not with all types of discrimination, but only with the civil and

but it is particularly difficult with regard to the Convention because of the contradictions inherent in its language.

Since Article 1(1) and Article 2(1)(d) offer no guidance on this difficult question, one must turn to other provisions of the Convention. Among the rights found in the catalog of rights in Article 5, one is of particular relevance: the guarantee under Article 5(f) of equality before the law in "[t]he right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks." While this specification is certainly important and helpful, it is an exaggeration to claim, as Schwelb did, that "Article 5 as a whole tells quite concretely what is meant by 'public life' and probably answers most of the difficult questions of interpretation which might arise."⁵⁰ For example, to what extent is housing (Art. 5(e)(iii)) provided by private developers⁵¹ covered by the Convention? The sanguine comment by Schwelb made in the context of possible U.S. ratification of the Convention is particularly striking when compared with his earlier acknowledgment that Article 5 "lists several rights which certainly do not come within the sphere of public life, e.g., the right to marriage and choice of spouse."⁵² The wide sweep of the Convention is emphasized by the fact that members of the Committee have inquired whether discrimination can be found "in the rental of a private apartment"⁵³ or admission to "private clubs."⁵⁴

It is correct, however, to suggest that "public life" is not synonymous with governmental action but is the opposite of "private life,"⁵⁵ which would thus not be reached by the Convention. But to apply this concept to concrete situations is difficult. The legislative history reveals concern that freedom of thought and expression may be jeopardized and the private life of individuals invaded.⁵⁶

Perhaps a rationale for at least some distinction between public and private life can be developed by reference to the right of association.⁵⁷

political rights that states must guarantee. The representative of Australia maintained that the latter interpretation was "more in keeping with the original intention of the framers." 28 UN GAOR Supp. (No. 40), paras. 155, 175, UN Doc. A/38/40 (1973).

⁵⁰ Schwelb, *The International Obligations of Parties to the Convention*, in N. NATHANSON & E. SCHWELB, *supra* note 17, at 1, 7.

⁵¹ Nathanson, *The Convention Obligations Compared with the Constitutional and Statutory Law of the United States*, in *id.* at 19, 34 (suggesting that an owner renting an apartment within his own private dwelling may be more reasonably entitled to exercise personal preference in choice of tenants than the owner of a large apartment house or a substantial real estate developer).

⁵² Schwelb, *supra* note 4, at 1005.

⁵³ 39 UN GAOR Supp. (No. 18), para. 238, UN Doc. A/39/18 (1984).

⁵⁴ *Id.*, para. 256.

⁵⁵ Schwelb, *supra* note 50, at 6. See also Ramcharan, *supra* note 18, at 262 (on prohibited discrimination by individuals, other than in personal and social relationships, under Article 26 of the Political Covenant).

⁵⁶ N. LERNER, *supra* note 4, at 38.

⁵⁷ On this right, see generally Humphrey, *Political and Related Rights*, in 1 Meron (ed.), *supra* note 17, at 171, 190-91; Partsch, *Freedom of Conscience and Expression, and Political*

That right is recognized in Article 5(d)(ix). It is widely acknowledged, however, that the catalog of human rights in Article 5 does not create those rights but merely obligates a state party to prevent racial discrimination in the exercise of those that it has recognized.⁵⁸ Article 5 could have been drafted in a manner that clearly defined this limitation. But a more explicit formulation would have emphasized the liberty of states to deny some of the rights listed, which would possibly have weakened the authority of the Universal Declaration of Human Rights, on which the catalog is based, and undermined the status of some rights as customary law. Although freedom of association is recognized in the Convention only in the limited context indicated above, that right is widely stated in other human rights instruments, including Article 22 of the Political Covenant, which establishes (Art. 22(2)) strict limits on any restrictions that may be imposed on its exercise. In accordance with the rule stated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the right of association—as a recognized principle of international human rights law—may therefore be taken into account in the interpretation of the Convention so as to protect strictly personal relations from its reach.

The approach taken by the U.S. Supreme Court in the recent case of *Roberts v. United States Jaycees*⁵⁹ is instructive in developing a rationale for the distinction between public and private life. This case involved gender-based discrimination, the constitutional freedom of association asserted by members of a private organization, and their First and Fourteenth Amendment rights. It suggests that in distinguishing “public” and “private” domains to determine the reach of the Convention, account should be taken of the relative smallness of a relationship or an association, the degree of selectivity exercised and the degree of seclusion from others.⁶⁰ Large business enterprises and their activities, e.g., hiring practices, are not entitled to the same protection from intrusion as more intimate associations. One must therefore carefully assess the objective characteristics of a particular relationship on a spectrum from the most intimate of personal attachments to the most attenuated, or from the least measure of public involvement to the most. While freedom to associate presupposes a freedom not to associate, the right to associate for expressive purposes is not absolute. With regard to large and unselective groups, there is a compelling public interest in eliminating discrimination and assuring access for all to publicly available goods and services, which includes not only tangible ones, but also privileges and advantages.

Freedoms, in Henkin (ed.), *supra* note 18, at 209, 235–37; Frowein, *Reform durch Meinungsfreiheit*, 105 ARCHIV DES ÖFFENTLICHEN RECHTS 169 (1980). Of particular importance is the case of Young, James and Webster, Eur. Ct. of Human Rights, 44 judgments and Decisions (ser. A, 1981), reprinted in 4 Eur. Hum. Rts. Rep. 38 (pt. 13, 1982), summarized in 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 440 (Eur. Ct. Human Rts.).

⁵⁸ 28 UN GAOR Supp. (No. 18), para. 42, UN Doc. A/9018 (1973). See also *id.*, paras. 53–56; 31 UN GAOR Supp. (No. 18), para. 56, UN Doc. A/31/18 (1976); 33 UN GAOR Supp. (No. 18), para. 21, UN Doc. A/33/18 (1978); Buergenthal, *supra* note 17, at 208–11.

⁵⁹ 104 S.Ct. 3244 (1984).

⁶⁰ *Id.* at 3250–51.

This or a similar approach should also be followed by state parties and the Committee. While certain private and interpersonal, associational relations would be insulated from the reach of the Convention, the activities of large private entities and of basically unselective organizations would be regarded as publicly available goods and services. Racial discrimination in the provision of these goods and services must be prohibited. In the absence of Convention guidelines for distinguishing the public from the private realm, this question will have to be answered through the case law of the Committee. One hopes that it will be done on the basis of criteria analogous to those applied by the Supreme Court in the *Roberts* case.

The dichotomy between the public and private realms also arises in the context of Article 2(1)(b), which forbids state parties to "sponsor, defend or support racial discrimination by any persons or organizations." Arguably, "support" encompasses not only the extension of benefits as a positive action, but also the failure to impose obligations that are required of other persons or organizations. Granting tax-exempt benefits to a private organization that discriminates on the basis of race, for example, might be construed as a violation of Article 2(1)(b). One commentator has concluded that any conflicts between the U.S. Constitution and this provision would not be serious⁶¹ because of the reach of the state action doctrine; this position perhaps overly minimizes the points of conflict between the two. For example, if a routine grant of a liquor license to a private club involved in racial discrimination is not state action in violation of the Fourteenth Amendment,⁶² is it clear that this is also true under the Convention? Where the reach of the obligations arising under the Convention corresponds to the reach of the Fourteenth Amendment, as determined by the decisions of the Supreme Court involving the state action doctrine, significant conflicts between the Convention and the Constitution need not arise. But where governmental inaction, acquiescence or tolerance⁶³ (e.g., as through regulation, licensing or enforcement) is deemed not to constitute state action and therefore lies beyond the reach of government's authority to fight "private" discrimination, conflicts would occur, were it not for the proposed U.S. reservations, declarations and understandings.⁶⁴ Moreover, the parameters of the state action doctrine, under which the acts of private organizations or individuals are subject to constitutional limitations if a sufficiently close relationship between those actions and governmental functions exists, are controversial and uncertain.⁶⁵ Since the degree to which governmental tolerance of private action will be considered state action is unclear, the possibility of conflict with the Convention remains.⁶⁶

⁶¹ Nathanson, *supra* note 51, at 20-22.

⁶² *Id.* at 21 (discussion of *Moose Lodge v. Irvis*, 407 U.S. 163 (1972)). On state action, see also 3 T. FRANCK, HUMAN RIGHTS IN THIRD WORLD PERSPECTIVE 463-66 (1982).

⁶³ See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1148 (1978).

⁶⁴ 1978 U.S. DIGEST, *supra* note 12, at 443-44; 72 AJIL at 621-22.

⁶⁵ See generally L. TRIBE, *supra* note 63, at 1147-74.

⁶⁶ Nathanson, *supra* note 51, at 21. *But see id.* at 22.

IV. SUPPRESSION OF RACIST THEORIZING AND RACIST ORGANIZATIONS

Article 4 imposes the following obligations on state parties: to penalize the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and the provision of any assistance to racist activities, including the financing of such activities (para. (a)); to declare illegal and prohibit organizations and all other propaganda activities that promote and incite racial discrimination, and participation in such organizations or activities (para. (b)); and to prohibit public authorities or institutions from promoting or inciting racial discrimination (para. (c)).

In paragraph (a) "assistance" is not defined. It might be extended to include providing financial support by purchasing the publications of racist groups,⁶⁷ or renting or leasing facilities such as public auditoriums to racist organizations.

Both racist groups as organizations and individuals who participate in such groups in violation of the prohibitions stated in Article 4 are subject to criminal sanctions. The opening paragraph of Article 4 identifies the eradication of all incitement to or acts of racial discrimination as the objective underlying the obligations enumerated. Paragraph (a) addresses the offense, rather than any particular offenders. Paragraph (b) covers not only organized, but also all other propaganda activities. It therefore appears that individuals who act alone in violation of the stated prohibitions are also subject to criminal sanctions.

The offenses set forth in Article 4 go beyond the definition of racial discrimination given in Article 1(1). The latter encompasses only such prohibited distinctions as lead to the denial of human rights on an equal footing. The former prohibits certain organizations and activities, including the dissemination of opinion and thought (ideas based on racial hatred or superiority), regardless of whether or not they lead to a denial of human rights. The obligations of Article 4 are also more extensive than those arising under Article 20(2) of the Political Covenant, which penalizes only such racial hatred as constitutes incitement to discrimination, hostility or violence. Given the tragic results of racist propaganda, e.g., in the Third Reich, the pain and suffering inflicted upon target groups, the tangible damage suffered, the vital community interest in the eradication of racial discrimination and its sources, and the conflict with the UN Charter goal of racial equality, the objectives of Article 4 are commendable. Racist propaganda must never be taken with equanimity. Its destructive potential even in developed societies is a matter of history. However, it is not the objectives and goals of Article 4 that create difficulties, but the relationship of the norms stated in it to other important values. While the article as a whole poses many problems, paragraph (a) gives rise to difficulties primarily in relation to freedom of expression and paragraph (b) challenges both freedom of expression and freedom of association.

⁶⁷ N. LERNER, *supra* note 4, at 49-50.

Article 4 explicitly mandates legislative action to implement its provisions. The Committee has insisted that reporting states have a duty to legislate irrespective of whether the prohibited activities actually occur in them, except where legislation that fully satisfies the provisions of Article 4 is already in place.⁶⁸ When reporting states maintain that preexisting law sufficiently implements Article 4, the Committee engages in substantive analysis to determine the adequacy of those provisions.⁶⁹ In a study approved by the Committee, Inglés has argued that Article 4 "is not self-executing. Despite the incorporation or transformation of the Convention as part of domestic law, article 4 may only be implemented if legislation is enacted to do what the article ordains."⁷⁰

That states must take legislative action in compliance with Article 4 irrespective of the actual existence of the prohibited activities or organizations is consistent with the prophylactic purposes of the Convention as indicated by the definition of racial discrimination, the wide scope of the obligations of the parties and the various educational measures mentioned in Article 7. The Committee has emphasized, correctly, that "[f]ar from being concerned solely with combating acts of racial discrimination after they have been perpetrated, the national policies of the State parties must also provide for preventive programmes, which seek to remove the sources from which those acts might spring—be they subjective prejudices or objective socio-economic conditions."⁷¹ A preventive penal policy is expressed through Article 4, which requires all state parties to make specified offenses punishable by law within their national legal systems, regardless of whether racial discrimination is actually practiced in their territories.⁷² While mandating criminal sanctions, Article 4 attempts to effect fundamental societal changes that should prevent the future occurrence of racial discrimination and violence: By creating prior restraints on freedom of expression and association, Article 4 seeks to eradicate racist thought and racist organizations, which generate racist acts. Thus, Inglés observes that "[a]rticle 4 aims at prevention rather than cure; the penalty of the law is supposed to deter racism or racial discrimination as well as activities aimed at their promotion or incitement."⁷³

Organizations that promote racial discrimination, and not merely their specific activities which have that purpose or effect, are prohibited. During the drafting debates, an amendment inserting the words "or the activities of such organizations" after the word "organizations" in paragraph (b) was not adopted,⁷⁴ perhaps because the very existence of such organizations was felt to be destructive of the aims of the Convention. Would the

⁶⁸ General Recommendation I, Dec. 3(V), 27 UN GAOR Supp. (No. 18) at 37, UN Doc. A/8718 (1972); 34 UN GAOR Supp. (No. 18), para. 226, UN Doc. A/34/18 (1979); 31 UN GAOR Supp. (No. 18), para. 245, UN Doc. A/31/18 (1976); Buergenthal, *supra* note 17, at 193-94; Partsch, *supra* note 57, at 229.

⁶⁹ See, e.g., 33 UN GAOR Supp. (No. 18), para. 320, UN Doc. A/33/18 (1978).

⁷⁰ Inglés, *supra* note 17, para. 216.

⁷¹ 33 UN GAOR Supp. (No. 18) at 109, UN Doc. A/33/18 (1978).

⁷² *Id.* at 110.

⁷³ Inglés, *supra* note 17, para. 221.

⁷⁴ N. LERNER, *supra* note 4, at 45.

language of that paragraph, as adopted, permit the prohibition of such groups as soon as it is clear that they intend to engage in promoting or inciting racial discrimination?⁷⁵ Members of the Committee have emphasized the need to outlaw certain organizations that in fact engage in incitement to racial discrimination, even though they do not proclaim such incitement to be their objective.⁷⁶ They have inquired whether action has been taken with the intention of dissolving associations pursuing goals that are illegal under Article 4.⁷⁷ If the aims of an organization are clear even before its formation, does the language of the provision permit its prohibition beforehand, rather than only its dissolution afterward? How are such aims determined? What is the level of activity necessary to constitute a violation? Inglés appears to answer the first of these questions in the affirmative by referring to legislation of states providing for the denial of permits to or registration of organizations with an illegal purpose, or their dissolution in the event that they have already been registered or granted permits.⁷⁸

Article 4 is potentially even broader than may at first be apparent from the text, because the initial paragraph employs the words "*inter alia*." But even those measures which are enumerated pose problems. The drafting and application of laws giving effect to Article 4 will be difficult, since the provision requires criminalization not only of acts and incitement to acts of racial discrimination and violence, but of the promulgation of racist theories and thought. With a few exceptions, traditional concepts of criminal liability require the commission of an act, or the failure to act when the law imposes a duty to do so, or incitement to action. But Article 4 also requires states to impose criminal liability for the dissemination of ideas (freedom of expression) alone.

When compared with U.S. law, this criminalization of speech and association (organizations) on the basis of racist content violates the content-neutral protection afforded by the First Amendment doctrine of freedom of expression.⁷⁹ But the different approach in the United States should not be explained on constitutional grounds alone. It also reflects, at least in recent history, the feeling of confidence and security in a developed and relatively stable society that, while failing to eradicate racism, has found orderly means of dealing with its racial problems, as

⁷⁵ *Id.* at 50.

⁷⁶ 32 UN GAOR Supp. (No. 18), para. 286, UN Doc. A/32/18 (1977).

⁷⁷ 39 UN GAOR Supp. (No. 18), para. 270, UN Doc. A/39/13 (1984). The Committee emphasized that it was not enough for the penal code to be applicable to individual members of an organization. The legislation should contain provisions prohibiting such organizations as required by Article 4(b). *Id.*, para. 509.

⁷⁸ Inglés, *supra* note 17, paras. 238-240.

⁷⁹ Greenberg points out that in the United States even groups that preach hatred, such as the Ku Klux Klan or the Nazis, benefit from the right of free expression, and their activities based on racial, ethnic or religious hatred are nearly uniformly permitted to continue. Greenberg, *supra* note 17, at 323-24. See *Collin v. Smith*, 578 F.2d 1197, *cert. denied*, 436 U.S. 953 (1978). But see "Smith Act," 18 U.S.C. §2385 (1982). For the interpretation of the Act by the Supreme Court, see *Scales v. United States*, 367 U.S. 503 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951).

well as the traditional preference for individual freedoms over the regulatory power of the state. In some other countries, however, activities and organizations that in the United States would often be regarded as creating only a marginal possibility of violence and threat to public order might be regarded as a clear and present danger.⁸⁰ If certain provisions of the Convention are overbroad when viewed against the U.S. legal and social systems, it does not necessarily follow that they are overbroad for some of the other countries. It is difficult, indeed, to find a common legislative policy for the member states of the United Nations in view of their diverse stages of development, and their different cultures, traditions, conditions of social peace and security. The purpose of these comments, of course, is not to make a value judgment about which legal and social systems are superior, but simply to state some of the relevant factors.

Dissemination of racist thought and participation in organizations that engage in promotion of racial discrimination are prohibited under Article 4 regardless of whether they lead to otherwise illegal conduct. Is there, then, a conflict between Article 4 and the principles of freedom of expression and association as they are recognized in international law? The opening paragraph of Article 4 reflects an effort to avoid such a conflict. The measures to be taken by state parties are to be adopted "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention." The freedoms of expression and association are indeed embodied in Article 5(d)(viii)–(ix), the Universal Declaration of Human Rights and the Political Covenant, but in these and other international human rights instruments these principles are not absolute; they are subject to various limitations, the scope of which is not clearly determined.⁸¹ Under Article 29(2) of the Universal Declaration, restrictions on the freedom of expression and association might be justified on the ground that the promulgation of racist ideas by individuals or groups would lead to the infringement of the rights of members of the targeted racial groups and adversely affect the public order and general welfare of society. This article has been invoked in support of limiting the dissemination of racist

⁸⁰ *P. Hemalatha v. Govt. of A. P.*, 63 A.I.R. 375 (A.P. 1976), paras. 19–24, *reprinted in* T. FRANCK, *supra* note 62, at 241; *The [Nigeria] Director of Public Prosecutions v. Chike Obi*, F.S.C. 56/1961, *reprinted in id.* at 229.

Even in the United States, however, racist invective has been considered punishable as criminal libel, although it was not shown that it involved a clear and present danger to the target group. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The present status of *Beauharnais* is a matter of some doubt. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court emphasized the principle that the constitutional guarantees of free speech and free press do not permit a state to proscribe advocacy of the use of force or of law violation except where such advocacy is directed at inciting or producing imminent lawless action and is likely to incite or produce it. The indictment of a Ku Klux Klan leader was overruled as contrary to the First and Fourteenth Amendments.

Regarding the "Front National" in France and claims for defamation submitted by its leader, Jean-Marie Le Pen, see *Le Monde*, Nov. 2, 1984, at 8, col. 3 (final ed.).

⁸¹ Universal Declaration, *supra* note 36, Arts. 19, 20, 29, 30; Political Covenant, *supra* note 36, Arts. 4, 19–22.

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ideas and the existence of racist organizations.⁸² Of course, the promulgation of racist ideas may affect the rights of others. But, depending on the situation in a particular society, the argument that the promulgation of such ideas inherently endangers public order is usually persuasive only when doing so constitutes incitement to acts of discrimination or violence, which is already prohibited in any case.

The "due regard" clause permits the invocation of another provision of the Universal Declaration, Article 30, which states that "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." This has been viewed as an injunction "against interpreting the Declaration as implying for any State the right to destroy any of the rights and freedoms proclaimed therein."⁸³ However, elsewhere, in discussing Article 4 of the Convention, the same commentator expressed the view that Article 30 of the Universal Declaration "does not preclude or prohibit reasonable limitations as are expressly set forth in Article 29(2) which do not have the purpose or effect of destroying those rights and freedoms."⁸⁴ Because it will be argued that the measures taken in implementation of Article 4 do not have the purpose or effect of destroying the rights or freedoms stated in the Declaration, Article 30 does not provide an effective protection against abuse. Despite its vagueness, Article 30 could have perhaps been relied upon by the Committee more seriously to balance the prohibition of racial discrimination with the freedoms of association and expression stated in the Universal Declaration. It can, of course, be invoked by states in the course of their interpretation and application of the Convention.

The Committee has paid lip service to the notion that the freedoms of expression and association "are not irreconcilable" with the obligations created by Article 4,⁸⁵ and to the "due regard" clause of that article, while expressing clear preference for the application of the norms stated in Article 4:

The Committee is fully aware that the Convention—in laying down the obligations of States parties with regard to the prohibition of the dissemination of racist ideas, incitement to racial discrimination or violence, and racist organizations—allows for the fulfilment of those obligations to be accomplished "with due regard" to the fundamental human rights to freedom of opinion, expression and association. However, it could not have been the intention of the drafters of the Convention to enable States parties to construe the phrase safeguarding the human rights in question as cancelling

⁸² For statements referring explicitly or implicitly to the limitation clauses of the Universal Declaration in construing Article 4, see, e.g., 33 UN GAOR Supp. (No. 18), para. 279, UN Doc. A/33/18 (1978); 34 UN GAOR Supp. (No. 18), para. 227, UN Doc. A/34/18 (1979).

⁸³ J. Inglés, Study of Discrimination in respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country 37, UN Doc. E/CN.4/Sub.2/220/Rev.1 (1963). See generally E. Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights 129–31, UN Doc. E/CN.4/Sub.2/432/Rev.2 (1983).

⁸⁴ Inglés, *supra* note 17, para. 228.

⁸⁵ 33 UN GAOR Supp. (No. 18) at 113, UN Doc. A/33/18 (1978).

the obligations relating to the prohibition of the racist activities concerned. Otherwise, there would have been no purpose whatsoever for the inclusion in the Convention of the articles laying down those obligations.⁸⁶

That a conflict arises has been acknowledged by some members of the Committee, for whom Article 4 supersedes freedom of expression and association.⁸⁷ Indeed, since Article 4 is premised on the belief that racist practices can be combated successfully only if the promulgation of racist ideas is curtailed, and, perhaps, on the view that such ideas are inherently dangerous, such a conclusion follows logically. As a matter of fact, in construing Article 20 of the Political Covenant, the Human Rights Committee has taken a position rather similar to that taken by the Committee on the Elimination of Racial Discrimination. It stated that the "required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities."⁸⁸ It thus emphasized the duty of states to fulfill their obligations under Article 20.

The wide sweep of Article 4 has caused occasional resentment even within the Committee.⁸⁹ Western states have expressed some opposition to the restraints on freedom of expression and association created by the article⁹⁰ and the Committee itself has admitted that only a few states have taken the necessary measures to implement it.⁹¹

The obligations specified apply clearly to statements or acts of public officials within the territories of the state parties. They must be deemed applicable also to the statements or acts of such officials in the United Nations and other international organizations.⁹² Thus, racist remarks may violate the obligations of the states concerned under the Convention and

⁸⁶ *Id.* at 112.

⁸⁷ See, e.g., *id.*, para. 51.

⁸⁸ General Comment 11, 38 UN GAOR Supp. (No. 40) at 110, UN Doc. A/38/40 (1983).

⁸⁹ Thus, one member of the Committee objected to the text of a questionnaire because the question concerning racist theorizing "appeared to assume that Member States were required to penalize all dissemination of ideas based on racial superiority and not merely propaganda activities aimed at encouraging racial discrimination." 30 UN GAOR Supp. (No. 18), para. 47, UN Doc. A/10018 (1975).

⁹⁰ Great Britain has interpreted the obligations of Article 4 to be limited by the extent to which they may be fulfilled with due regard to the principles embodied in the Universal Declaration, in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. MULTILATERAL TREATIES, *supra* note 9, at 104. Other governments, e.g., Belgium, *id.* at 98, have emphasized the need both to adopt the necessary legislation and to respect the freedoms of expression and association. In transmitting the Convention to the Senate, the United States has made a general declaration limiting the scope of the obligations assumed under the Convention to those which would not restrict the right of free speech as guaranteed by the U.S. Constitution and laws of the United States, and by Article 5 of the Convention. 1978 U.S. DIGEST, *supra* note 12, at 443. The Government of the Federal Republic of Germany, "after careful consideration, reached the conclusion that dissemination of opinions of racial superiority should be punishable if it was intended to create racial discrimination or hatred." 32 UN GAOR Supp. (No. 18), para. 87, UN Doc. A/32/18 (1977). See also Inglés, *supra* note 17, para. 225.

⁹¹ 39 UN GAOR Supp. (No. 18), para. 303, UN Doc. A/39/18 (1984).

⁹² On some other aspects of the extraterritorial reach of the Convention, see Buergethal, *supra* note 17, at 211-18. See generally Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542 (1978).

should be scrutinized by the Committee. In an international forum, the balancing of the various factors involved, such as the freedom of speech of governments against the Charter principles of racial equality of all persons and friendly relations among nations, may lead to results different from those which obtain internally in some states, where the freedom of speech of individuals, balanced against an all-powerful state and other community interests, is often an endangered value and deserves special protection. The prohibition of certain types of racist propaganda in the Convention and the Political Covenant should be observed first and foremost within the parent organization. Unfortunately, this is not always the case.⁹³

Some of the obligations under the Convention apply, of course, to private individuals. But the Committee has never determined how far into private life the obligations of the Convention extend. Do they, for instance, cover racist remarks made between members of the same family, or in a private letter not aimed at circulation or publication? According to some members of the Committee, insulting or defamatory racist remarks made to individuals should be included in the conduct to be penalized.⁹⁴ Some comments made by the members suggest that they have an extremely broad conception of the Convention's provisions. Thus, one state party was criticized for legislation requiring that certain offenses must be committed publicly in order to be punishable (e.g., "discriminatory measures which could be taken through correspondence" would not be covered by the legislation;⁹⁵ members or supporters of an association that advocated racial discrimination could be punished only when their activities "took place publicly"⁹⁶). Another state reported to the Committee that in implementing Article 4, it had outlawed any form of racial discrimination, "including verbal,"⁹⁷ without specifying, however, whether this encom-

⁹³ An egregious example of racist remarks can be found in the statement made in the UN General Assembly by the representative of the Libyan Arab Jamahiriya:

It is high time for the United Nations and the United States in particular to realize that the Jewish Zionists here in the United States attempt to destroy Americans. Look around New York. Who are the owners of pornographic film operations and houses? Is it not the Jews who are exploiting the American people and trying to debase them?

UN Doc. A/38/PV.88, at 19-20 (1983).

⁹⁴ 34 UN GAOR Supp. (No. 18), para. 157, UN Doc. A/34/18 (1979). Nevertheless, some members of the Committee noted with regard to a penal provision of Norway, which covered only public utterances and communications, that "private utterances and communications lay outside the field in which the penal law could effectively be applied without an oppressive system of surveillance." 32 UN GAOR Supp. (No. 18), para. 157, UN Doc. A/32/18 (1977).

⁹⁵ 39 UN GAOR Supp. (No. 18), para. 238, UN Doc. A/39/18 (1984) (in the case of Belgium).

⁹⁶ *Id.* The representative of Belgium responded that the Belgian Act "would not apply in the case of a landlord who refused to rent a private apartment to a foreigner, because it would be very difficult to present legal evidence of the grounds for the refusal, unless there were witnesses." The requirement that the activities of racist associations be known to the public in order to be punishable resulted from the difficulty of proving any practice that was not a matter of public knowledge. *Id.*, para. 244.

⁹⁷ *Id.*, para. 276 (in the case of Denmark).

passed the private communication of ideas. If private as well as public communication of racist ideas is prohibited, it might invite state invasion of the right to privacy. In light of the harm caused by such behavior, would private civil actions be a more appropriate remedy, by reducing the scope of possible encroachment by the state into interpersonal relations? Nevertheless, civil actions would probably not effectively limit such conduct without the deterrent effect of criminal sanctions.

Concepts of criminal liability in U.S. law usually link culpability with intent as closely as possible. But Article 4 appears not to be based on the requirement of intent. Members of the Committee have interpreted the article accordingly and appeared to endorse the notion that it is based on absolute liability.⁹⁸ Inglés thus emphasizes "that the mere act of dissemination is penalized, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination, whether it be grave or insignificant."⁹⁹ He criticized state parties whose legislation addresses only such dissemination or incitement as is intentional, or has the objective of stirring up hatred, or is threatening, abusive or insulting: "Obviously, these conditions are restrictive and ignore the fact that Art. 4(a) declares punishable the mere act of dissemination or incitement, without any conditions."¹⁰⁰

The point at which the culpability of a particular organization is sufficiently clear to warrant intervention by the state may be defined by states in a manner that restricts freedom of expression and privacy more than is necessary to achieve the objectives of Article 4.¹⁰¹ But if the drafters had specified intent as an element of the offenses listed, the difficulties attendant upon proving intent would have hampered the effectiveness of the article.

Given the prophylactic purposes of Article 4, limitations on the exercise of free speech and on the right of association are unavoidable, while the reconciliation of the conflicting principles is artificial. If the drafters feared that the effectiveness of the provision would be hampered by introducing the requirement of intent,¹⁰² they should at least have defined the offenses more specifically, and, perhaps, more narrowly. The Convention should

⁹⁸ 32 UN GAOR Supp. (No. 18), para. 84, UN Doc. A/32/18 (1977). In reviewing the adequacy under Article 4 of Great Britain's Race Relations Act, members of the Committee approved a change in that legislation dispensing with the necessity "to prove a subjective intention to stir up racial hatred." Moreover, they implicitly endorsed absolute liability under Article 4 in disapproving the provision of the Race Relations Act that in the publication or distribution of written matter "it shall be a defence for the accused to prove that he was not aware of the content of the written material in question and neither suspected nor had reason to suspect it of being threatening, abusive or insulting." 33 UN GAOR Supp. (No. 18), para. 339, UN Doc. A/33/18 (1978). One member of the Committee expressed the opinion "that the question of [the offender's] good faith and intent did not enter into consideration in the implementation of article 4." 35 UN GAOR Supp. (No. 18), para. 338, UN Doc. A/35/18 (1980).

⁹⁹ Inglés, *supra* note 17, para. 83.

¹⁰⁰ *Id.*, para. 235.

¹⁰¹ See generally N. LERNER, *supra* note 4, at 51.

¹⁰² Some states (e.g., the Federal Republic of Germany, *supra* note 90) insist, nevertheless, upon the requirement of intent.

have made punishable primarily individual conduct, or the conduct of individuals acting as a group, rather than the existence of organizations (unless involved in acts of violence, incitement to violence or other illegal acts) and the promulgation of ideas, which would have limited the danger of encroachment on the freedom of expression and arbitrary censorship. Finally, by reducing the scope of Article 4 to public conduct, the drafters might have avoided conflict with the right to privacy in familial and intimate associational contexts, reduced the danger of intrusive state action and lessened the conflict with the principle of freedom of opinion and expression. The overreach of Article 4 creates difficulties for democratic states that take their obligations seriously, and has prompted some of them to enter a relatively large number of reservations to that article.¹⁰³

Neither Article 4 nor the definitional provisions of the Convention address religious discrimination or invective. This omission poses problems when vilification occurs in the gray area between race and religion. The Norwegian Supreme Court dealt with an interesting case in point a few years ago; the judgment was included in the recent periodic report submitted by Norway to the Committee.¹⁰⁴ The case concerned an appeal from a conviction by a district court holding that the defendant had violated the penal code by circulating leaflets that violently attacked Norwegian policy on the immigration of "Islamic foreign workers," the workers themselves and the religion of Islam. In "a weighing up process," Associate Justice Aasland compared utterances concerning Islam as a religion, conditions in the Islamic states and Norwegian immigration policy, which were protected by the freedom of expression under the Constitution, with utterances that more directly attacked Islamic immigrants in Norway. The target of the leaflets was Islamic immigrants, their character and their behavior. Under the penal code, attacks on the characteristics of a population group and its behavioral pattern were punishable. Such attacks exposed that population group to hatred and contempt. Unless they were punished, it would be impossible to accord an exposed minority group the protection intended by the law.

This judgment was praised by some members of the Committee as a good example of the implementation of Article 4 and as striking a balance between freedom of expression and the ban on incitement to racial discrimination: "Though the defendant was held entitled to express certain general views, she had broken the law when she had directed her remarks against specific ethnic groups."¹⁰⁵ The judgment led the Committee to consider whether religious discrimination was covered by Article 4. Some members believed that an attack on a particular religion would not breach the Convention, while an attack on an identifiable national or ethnic group would. Others said that good grounds could be found for extending the Convention to cover attacks against religion.¹⁰⁶ It remains to be seen whether the Committee will try to interpret the Convention as reaching

¹⁰³ See MULTILATERAL TREATIES, *supra* note 9, at 97-107.

¹⁰⁴ Judgment No. 134 B/1981, *reprinted in* UN Doc. CERD/C/107/Add.4, at 14 (1984).

¹⁰⁵ 39 UN GAOR Supp. (No. 18), para. 509, UN Doc. A/39/18 (1984).

¹⁰⁶ *Id.*, para. 507.

incitement to hatred of groups that belong to a particular religious persuasion and have certain ethnic characteristics as well.

V. AFFIRMATIVE ACTION

Race-Conscious Policies under Affirmative Action Programs

Article 1(4) allows state parties to take

[s]pecial measures . . . for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms . . . , provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This provision carves out an exception to the definition of racial discrimination. One consequence of the emphasis on racial equality is that the adverse effect upon a privileged racial group of the "[s]pecial measures" that may be taken pursuant to Article 1(4) would not be considered racial discrimination¹⁰⁷ until and unless the measures led to "the maintenance of separate rights for different racial groups" or "continued after the objectives for which they were taken have been achieved." Thus, bona fide affirmative action programs cannot be challenged under the Convention, as they could be if the Convention mandated color-blind policies.¹⁰⁸

Because a violation of the exception stated in Article 1(4) may become apparent only after the passage of time, there is a danger that states may use this provision to legitimize discriminatory practices. The Committee has been alert to this danger, however, and has scrutinized reports from states accordingly.¹⁰⁹

Affirmative Action Measures: Their Necessity and Scope

While Article 1(4) excludes affirmative action from the definition of racial discrimination, Article 2(2) actually obliges state parties to take affirmative action. They shall,

when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

¹⁰⁷ See generally N. LERNER, *supra* note 4, at 32-33.

¹⁰⁸ However, the Government of Papua New Guinea justified its caution in protecting ethnic groups on the ground that "protection of one group might be considered discrimination against others." 39 UN GAOR Supp. (No. 18), para. 284, UN Doc. A/39/18 (1984).

¹⁰⁹ E.g., with regard to the provisions of the Constitution of India amended to extend the special reservation of seats in the Parliament and in the legislative assemblies for the scheduled castes and tribes and for the Anglo-Indian community for an additional period of 10 years. 38 UN GAOR Supp. (No. 18), para. 280, UN Doc. A/38/18 (1983). The

This article as drafted fails to provide standards for determining which groups should benefit from special measures and when the political, economic and social circumstances of those groups warrant the introduction of such measures. The words "when the circumstances so warrant" suggest that a considerable measure of discretion is left to the states in deciding when remedial steps must be taken. Although the article mentions "protection," it does not provide safeguards against the use of special measures that promote the "adequate development" of ethnic groups to achieve their assimilation into the society at large.

Article 2(2) does not concern individual rights but protects groups of persons¹¹⁰ or individuals *qua* members of the group. Because of the wide acceptance of the Convention by states, the Convention and the Committee can play an important role in the protection of ethnic groups. Article 27 of the Political Covenant protects various rights of persons belonging to certain minorities, but it does not explicitly provide for affirmative action.¹¹¹ While the Convention addresses racial "groups" (without specifying their percentage of the total population) rather than "minorities," this usage may encompass protection of ethnic minorities as defined for purposes of Article 27.¹¹²

representative of India stated that 40 years was not a long period to bring to the level of the rest of the community groups that for centuries have been subjected to repression. *Id.*, para. 285. For a discussion of these and other affirmative action provisions of the Indian Constitution as applied to the reservation of a certain percentage of seats in professional and technical colleges in favor of "socially and educationally backward Classes," see Singh v. Mysore, 47 A.I.R. 338 (Mysore 1960), *reprinted in* T. FRANCK, *supra* note 62, at 428. It is of interest to contrast this case with Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). See also Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).

¹¹⁰ 37 UN GAOR Supp. (No. 18), para. 468, UN Doc. A/37/18 (1982). Regarding group rights, see Humphrey, *Political and Related Rights*, in 1 Meron (ed.), *supra* note 17, at 171, 171-72.

¹¹¹ For a discussion of the scope of minority rights under Article 27, see Sohn, *The Rights of Minorities*, in Henkin (ed.), *supra* note 18, at 270, 282-87. On minorities in general, see F. CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES*, *reprinted in* UN Doc. E/CN.4/Sub.2/384/Rev.1 (UN Sales Pub. No. E.78.XIV.1, 1979); Ermacora, *The Protection of Minorities before the United Nations*, 182 RECUEIL DES COURS 247 (1983 IV).

In Communication No. R.6/24 (*Sandra Lovelace v. Canada*), the Human Rights Committee established under Article 28 of the Political Covenant concluded that Sandra Lovelace, an ethnic Indian who because of her marriage to a non-Indian had lost her status as Indian under the provisions of the (Canadian) Indian Act, was entitled to be regarded as belonging to the Indian minority and to claim the benefits of Article 27 of the Political Covenant. Taking into account the fact that her marriage had broken up, and that she had been absent from the reservation for only a few years, the Committee concluded that to deny her the right to reside on the reservation was not reasonable and constituted an unjustified denial of her rights under Article 27. 36 UN GAOR Supp. (No. 4C), Ann. XVIII, UN Doc. A/36/40 (1981). See Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, 20 CAN. Y.B. INT'L L. 244 (1982).

¹¹² For the meaning of "minorities" in the context of Article 27 of the Political Covenant, see Sohn, *supra* note 111, at 276-80.

The Commission on Human Rights recently asked the Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare a definition of the term "minority." UN Doc. E/CN.4/Sub.2/1984/31. Such a definition would not focus on the interpretation

The definition of racial groups gives rise to some questions. First, should the words "certain racial groups" be interpreted to mean those groups not possessing majoritarian political status or adequate representation in the political and economic process or those constituting less than a majority of the total population? Unless the former interpretation is followed, the obligation to adopt special measures on behalf of ethnic groups with a limited share in the political and economic process¹¹³ could be avoided by asserting that they constitute the largest percentage of the total population.¹¹⁴ Conversely, racial groups that possess full political and economic rights do not qualify for special action under Article 2(2).¹¹⁵ The obligations arising from Article 2(2) may also prove difficult to implement in countries with populations consisting of a large number of discrete ethnic or tribal groups,¹¹⁶ no single one of which constitutes a majority of the total population.

How to identify racial groups presents a second set of definitional problems. A state may recognize a racial or ethnic group as distinct on the basis of linguistic, religious, economic or social characteristics, or some combination of these features.¹¹⁷ If a group is not identifiable as ethnically discrete, it is not entitled to the protection of Article 2(2).¹¹⁸ For example, a tribe that has traditionally been nomadic may not otherwise be distinguishable on the basis of physical characteristics, and if cultural and other nonracial characteristics are ignored,¹¹⁹ a state might attempt to deny that group the protection of Article 2(2). The degree to which a given group must be different from the remainder of the population to benefit from the provisions of Article 2(2) is not clear.¹²⁰ States may attempt to evade their duties by refusing to acknowledge that a specific group should be

of Article 27 of the Political Covenant. By contrast, Capotorti's tentative definition (*see supra* note 111, para. 568) was drawn up solely with the application of Article 27 in mind. It spoke, in part, of a "group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members . . . possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." *Cited in* UN Doc. E/CN.4/Sub.2/1984/31, at 2.

¹¹³ The Committee has requested information on the machinery for drawing minorities into the political process in compliance with Articles 1(4) and 2(2) of the Convention. 39 UN GAOR Supp. (No. 18), para. 356, UN Doc. A/39/18 (1984) (Vietnam).

¹¹⁴ *See generally* J. SIGLER, MINORITY RIGHTS: A COMPARATIVE ANALYSIS 5, 8 (1983).

¹¹⁵ Members of the Committee have inquired, rather suspiciously, about the extent of the separation and points of contact "between the elite minority community" of Mauritius and the rest of the population. 39 UN GAOR Supp. (No. 18), para. 254, UN Doc. A/39/18 (1984).

¹¹⁶ E.g., Tanzania. *See* 38 UN GAOR Supp. (No. 18), para. 330, UN Doc. A/38/18 (1983).

¹¹⁷ *See generally* J. SIGLER, *supra* note 114, at 6-10.

¹¹⁸ Sigler observes that "[m]ost nations avoid problems of group rights by simply not recognizing the status of the group." *Id.* at 12-13.

¹¹⁹ *See generally id.* at 10.

¹²⁰ E.g., should Spanish Basques be identified only as a linguistic minority, or do they constitute a discrete ethnic group? 37 UN GAOR Supp. (No. 18), para. 281, UN Doc. A/37/18 (1982).

defined as ethnically distinct.¹²¹ States' obligations to resort to affirmative measures should be determined by the group's degree of access to political and economic resources, rather than by overemphasis on the anthropological analysis of the group's relationship to the rest of the population. While Article 2(2) does not provide standards for determining when circumstances warrant special measures,¹²² the text suggests that the test is whether the group in question requires the protection and aid of the state to attain a full and equal enjoyment of human rights.¹²³ Article 2(2) uses the term "racial groups," not races, which suggests perhaps a wider spectrum of beneficiaries. But the absence of clear definitions and the anthropological difficulty of defining¹²⁴ and identifying racial groups lead to the conclusion that this problem will continue to be troublesome.

To determine whether a state has complied with the obligations imposed by Article 2(2), demographic statistics specifying the ethnic composition of the population may be essential, and possibly a socioeconomic profile of the various ethnic groups as well.¹²⁵ Data based on religious¹²⁶ or

¹²¹ The representative of Niger argued that discrimination against nomadic groups in his country was economic, not ethnic. 38 UN GAOR Supp. (No. 18), para. 494, UN Doc. A/38/18 (1983).

¹²² Should Canadian Indians who have left the reservations no longer enjoy the same rights or protections as are afforded to those who remained on the reservations? Was the definition of membership in such groups too restrictive? *Id.*, para. 394. See also note 111 *supra*.

¹²³ Australia has recognized that its aboriginal citizens constitute a group for whom special and concrete measures are required to promote their development. 39 UN GAOR Supp. (No. 18), para. 328, UN Doc. A/39/18 (1984). Members of the Committee have inquired how the aboriginal people could be helped to achieve in practice their full political and civil rights. *Id.*, para. 335.

¹²⁴ See generally UN Doc. E/CN.4/Sub.2/1984/31, at 4.

¹²⁵ The Committee has thus requested that Italy include in its next periodic report a comparative socioeconomic analysis of the various minorities and ethnic groups so that it could be determined for which of those groups measures should be adopted to ensure their adequate development. 39 UN GAOR Supp. (No. 18), para. 300, UN Doc. A/39/18 (1984). The Committee has requested that the Government of the Central African Republic provide information not only on the demographic composition of the population, but also on the socioeconomic situation of the various ethnic groups and about measures to improve the living conditions of the pygmies. *Id.*, para. 117. In emphasizing its interest in the participation of ethnic groups in the economic and political processes, the Committee requested that the Government of Colombia provide information

on the National Development Programme for Indigenous Peoples, measures to help disadvantaged groups and comparative figures for the various groups relating to education, per capita income, housing and medical care. Statistics should also be furnished . . . on the employment of members of the various racial groups in the public service and their representation among elected officials. The Committee would also like to have information on the enjoyment by members of the indigenous population of their political as well as cultural rights, their real situation. . . .

Id., para. 131.

¹²⁶ In the case of Mauritius, which classifies its population on a religious rather than an ethnic basis, members of the Committee asked how a race relations act could be effective if information on the racial composition of the population was no longer kept. *Id.*, paras. 252, 256.

linguistic affiliation are often irrelevant for these purposes.¹²⁷ But states may be unable to compile accurate demographic profiles because the census may not be frequently or effectively taken, or it may be considered improper to inquire about ethnicity or the inhabitants may not be required to indicate their race.¹²⁸ Recognizing the difficulties, the Committee has agreed that demographic statistics need not be precise but should at least indicate percentages of the total population and that it should press countries that have not been able to supply such information to do so when ethnic problems arise.¹²⁹

Towards Assimilation?

Another problem—already mentioned—stems from the absence of safeguards against the use of measures that, in promoting the adequate development of racial groups in social, economic, cultural and other fields, constitute assimilationist policies and may result in a group's loss of cultural identity. Article 2(2) does not require states to aid in the preservation of cultural identity, but the reference to the cultural field and to "protection," rather than only to "development," suggests that at least the spirit of the Convention would be violated by such measures. Some states have shown considerable awareness of their obligations in this regard.¹³⁰ To some extent, the Committee has compensated for the deficiency by focusing inquiry upon the relevant issues. In examining specific programs undertaken for the adequate development of certain racial groups, and the consequences of such measures, the Committee has recognized the tension between the need for social and economic equality and the need to preserve the integrity of discrete cultures. Thus, in discussing the report of New Zealand, the Committee stated that the "one Nation: two peoples" approach followed by that state "in order to preserve the identity of the Maori . . . was within the context of article 2 and the Committee's policy on minorities."¹³¹ The Committee inquired both whether the Maoris lived in segregated areas and whether the Maori community living in urban areas was at risk of losing its identity.¹³²

If a state carries the concept of integration of ethnic groups into the mainstream of society too far, and traditions and customs are abandoned,

¹²⁷ 37 UN GAOR Supp. (No. 18), para. 108, UN Doc. A/37/18 (1982).

¹²⁸ 32 UN GAOR Supp. (No. 18), para. 87, UN Doc. A/32/18 (1977) (the Federal Republic of Germany). The Committee requested information on the demographic composition of the Algerian population. Its members asked for clarification regarding the assertion in Algeria's report that a census of the Algerian population on ethnic or racial grounds would be contrary to Islam. 39 UN GAOR Supp. (No. 18), para. 91, UN Doc. A/39/18 (1984).

¹²⁹ 38 UN GAOR Supp. (No. 18), paras. 513–14, UN Doc. A/38/18 (1983).

¹³⁰ For the Italian Government, the problem was not the assimilation of the members of minorities, "since they were completely integrated into the Italian society and had the same economic and political rights as the rest of the population, but the preservation of their cultural identity and languages." 39 UN GAOR Supp. (No. 18), para. 307, UN Doc. A/39/18 (1984).

¹³¹ *Id.*, para. 78.

¹³² *Id.*

could that constitute "a form of racial discrimination?"¹³³ Would educational programs instituted by the government to promote the use of the official language by the indigenous population result in the assimilation of diverse cultures? To avoid such a result, the use of the group's own language should be preserved and not eliminated by the official language.¹³⁴ One should be aware, however, of the danger that measures purportedly taken to preserve the language and the culture of a particular group, and that separate it from the community at large, may be used as a vehicle for continuing discrimination.

In reviewing reports, the Committee has warned that when governments take measures to promote the development of ethnic groups, they must guard against the assimilation that might result. On occasion, members of the Committee have injected questions about claims of regional autonomy¹³⁵ and even self-determination¹³⁶ into its deliberations.

In states composed of various discrete racial or ethnic groups, the obligation to take special measures for their protection may conflict with the perceived need to create a cohesive national identity,¹³⁷ because such measures may ultimately isolate rather than integrate the groups.¹³⁸ The traditional rights of groups to land¹³⁹ may conflict with the government's

¹³³ 29 UN GAOR Supp. (No. 18), para. 121, UN Doc. A/9618 (1974) (Norwegian Lapps and Gypsies). In response to comments from members of the Committee, the representative of Norway indicated that employment opportunities offered to the Lapps allowed them to retain their traditional way of life and that the Government did not try to impose an alien way of life on Gypsies. 31 UN GAOR Supp. (No. 18), paras. 207, 212, UN Doc. A/31/18 (1976).

¹³⁴ 38 UN GAOR Supp. (No. 18), para. 210, UN Doc. A/38/18 (1983) (measures taken by the Government of Venezuela to promote the use of Spanish). The Committee requested information on whether the Government of the Central African Republic recognized and protected the rights of minorities to have their own language and develop their own culture (39 GAOR Supp. (No. 18), para. 117, UN Doc. A/39/18 (1984)) and on what was being done in Colombia to preserve the indigenous languages. *Id.*, para. 131.

¹³⁵ 31 UN GAOR Supp. (No. 18), para. 70, UN Doc. A/31/18 (1976) (Iraqi Kurds).

¹³⁶ 37 UN GAOR Supp. (No. 18), para. 197, UN Doc. A/37/18 (1982) (ethnic groups in Ethiopia).

¹³⁷ The Committee inquired how the policy of Botswana of "discouraging ethnocentrism among the different ethnic groups could be reconciled with the establishment of a separate house of chiefs in addition to the National Assembly" (39 GAOR Supp. (No. 18), para. 105, UN Doc. A/39/18 (1984)) and "how the efforts being made to preserve racial harmony affected the traditions of various ethnic groups in the country, what provision was made to preserve their culture, and what were the consequences of fostering the process of nation-building while guaranteeing the identity of ethnic groups." *Id.*, para. 106.

¹³⁸ 37 UN GAOR Supp. (No. 18), para. 162, UN Doc. A/37/18 (1982) (an apparent inconsistency between Panamanian policies of integrating indigenous groups and of maintaining geographically distinct zones for them).

¹³⁹ In the case of Colombia, the Committee requested information

regarding the indigenous population living in the reservation lands . . . the Government's land policy, the legal status of reservations, whether the indigenous population had the right to acquire real property elsewhere in Colombia and dispose of it at will, . . . development of reservation lands, . . . how the rights of the indigenous population were protected if a reservation was used for a national development project, whether

land use and redistribution policies, since the latter may stimulate the dispersal of racial groups and a consequent loss of cultural identity.¹⁴⁰ The conflict between guaranteeing economic rights and preserving traditional ways of life may often be irreconcilable.¹⁴¹ Such forces as industrialization, population growth, the depletion of resources and the introduction of new agricultural techniques require adaptation, which erodes cultural identity unless, perhaps, the government resorts to a policy of territorial grants.¹⁴² If Article 2(2) had been more carefully worded, it still might not have ensured the equalization of rights among ethnic groups without loss of cultural identity, but the present text exacerbates the difficulties through its lack of precision and standards.

VI. THE EXCEPTION BASED ON CITIZENSHIP

Article 1(2) provides an exception to the applicability of the Convention that is overly broad. It allows state parties to make "distinctions, exclusions, restrictions or preferences . . . between citizens and non-citizens." Article 1(3) states that nationality, citizenship or naturalization provisions of a particular state may not discriminate against any particular nationality, but no provision prohibiting discrimination against particular nationalities is made with regard to other matters. Under the wording of Article 1(2), a state discriminating on the basis of race or ethnic origin may try to claim that the measures it has taken are permissible because they are based upon alienage, since members of a given ethnic group may also be noncitizens. Such claims would be critically scrutinized by the Committee as to whether discrimination against a particular nationality on grounds of race¹⁴³ was involved. But given the difficulty of establishing that racial factors were implicated (e.g., in the case of a mass expulsion of aliens who happened to belong to a different ethnic or tribal group), a more careful formulation, placing upon the state the burden of demonstrating that its discriminatory action was based *exclusively* upon alienage, would have been preferable.

the indigenous population was permitted to migrate from its reservation land, and, if so, whether it lost its rights to the land from which it had emigrated.

39 UN GAOR Supp. (No. 18), para. 131, UN Doc. A/39/18 (1984).

¹⁴⁰ 31 UN GAOR Supp. (No. 18), para. 226, UN Doc. A/31/18 (1976) (with regard to the percentage of Ecuadoran Indians who had benefited from Ecuadoran agrarian reform); 37 UN GAOR Supp. (No. 18), para. 102, UN Doc. A/37/18 (1982) (has Fiji reserved for specific racial groups land leased by the Government, and what was the traditional or tribal basis for such leases?).

¹⁴¹ The different policies followed by some Latin American governments on these questions—an amalgam of the various races vs. integration of ethnic groups into the body politic while preserving their respective ethnic characteristics—were noted in 31 UN GAOR Supp. (No. 18), para. 234, UN Doc. A/31/18 (1976).

¹⁴² 33 UN GAOR Supp. (No. 18), para. 300, UN Doc. A/33/18 (1978) (Brazilian policy of gathering the indigenous Amazon groups into certain areas of the country where they could live in conformity with their traditions or, if they so desired, strengthen their contacts with the outside culture).

¹⁴³ See, e.g., 28 UN GAOR Supp. (No. 18), para. 63, UN Doc. A/9018 (1973).



from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months." How can the procedure be put into operation if a particular state, invoking the optional character of Article 14(2), has neither established nor indicated a "body"?

Article 14(7)(a), which provides that the Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available local remedies, except where the application of the remedies is unreasonably prolonged, makes no mention of either the "body" or the 6-month period. Because of concern that without the establishment of the "body" the procedure outlined in Article 14 could not be put into operation, an attempt has been made in the Committee to interpret Article 14(2) as requiring the existence of a body.¹⁵⁷ There is, however, no merit in that interpretation.¹⁵⁸ It should obviously be left to states to decide how to handle complaints of racial discrimination in their domestic legal systems. Some countries may feel that the complexity of such complaints necessitates the involvement of various organs, depending upon the subject (e.g., housing or employment) or the various competent levels of government (e.g., federal, provincial, municipal).

The practical problems arising from the deficient drafting of Article 14 have been largely resolved by the Committee's Provisional Rules of Procedure. Rule 90(f) (now 91(f)) provides that the Committee or its working group shall ascertain "[t]hat the communication is, except in the case of duly verified exceptional circumstances, submitted within six months after all available domestic remedies have been exhausted, including, when applicable, those indicated in paragraph 2 of article 14."¹⁵⁹ Rule 90(e) (now 91(e)) establishes the broader principle that the Committee should ascertain whether the individual has exhausted all available domestic remedies, including, when applicable, those mentioned in Article 14(2), except when the application of the remedies is unreasonably prolonged. The Committee's Rules of Procedure, by making it possible for the petition system to function without burdening states with obligations not dictated by the text of the Convention, provide a practical resolution of the problems created by the lack of textual clarity.

¹⁵⁷ It was thus argued that "while it was true that the word 'may' was used in that paragraph, it was the 'establishment' or 'indication' of that body that was optional, and not its existence." 32 UN GAOR Supp. (No. 18), para. 124, UN Doc. A/32/18 (1977).

¹⁵⁸ This interpretation ignores the clear meaning of the text. The word "may" was used to indicate the optional nature of the procedure. N. LERNER, *supra* note 4, at 84. Obviously, the "body" cannot exist unless it is "established" as a new entity, or it preexisted and is identified or indicated by the state party. The procedures outlined in paragraphs 4 and 5 are intended to ensure that local remedies have been exhausted, but the existence of such remedies need not depend upon the existence of the "body"; other judicial or administrative forums providing such remedies may exist.

¹⁵⁹ Procedure for Considering Communications from Individuals under Article 14 of the Convention, 38 UN GAOR Supp. (No. 18) at 138, 141-42, UN Doc. A/38/18 (1983). For the current Rules of Procedure, see UN Doc. CERD/C/35/Rev.2 (1984).

remain within the framework of the Convention without actually having to implement some of its normative provisions have not gone to the trouble of doing so, sometimes perhaps because of a desire to avoid highlighting their difficulties or because of a cynical attitude towards international human rights commitments. Thus, although only a small minority of state parties have made reservations to Article 4, most states have not carried out their obligation under that article to adopt the necessary implementing legislation.

The tension between certain norms stated in the Convention and some of the rights with which it appears to conflict reflects divergent community priorities and important societal differences, especially when the reality and immediacy of danger to the public peace posed by racist organizations and theories must be assessed and the rights of expression, association and privacy are involved. The Convention requires that policies that perpetuate racial discrimination be changed, but it does not furnish adequate guidance about permissible restraints on implementation or balancing considerations that may properly be invoked by state parties. Like other human rights instruments, the Convention is occasionally drafted in such general terms as to make its application to specific cases difficult.¹⁶²

Several crucial provisions of the Convention suffer from deficient drafting. Some of these deficiencies result from the fact that the definition of racial discrimination was not adjusted to the operative provisions after the latter were drafted. The speed with which the Convention was considered and adopted, the robustness of the political forces that pushed its formulation and adoption, and perhaps a certain impatience with the niceties of legal drafting are among the factors that underlie some of the problems discussed in this study. The imperfect text that resulted, of course, reflects the political issues and realities of the United Nations. It would be simplistic to expect that difficulties due to these factors could have been avoided through better legislative techniques. But some, if not all, of the Convention's weaknesses could have been avoided through better legislative techniques and skills, especially where there was no political reason for the language selected and the inadequate drafting.

The United States¹⁶³ and other governments have rightly criticized the UN human rights lawmaking process.¹⁶⁴ Here one can only speculate whether, for a highly political subject and in a politicized environment, resort to the legislative techniques followed by the International Law Commission,¹⁶⁵ the United Nations Commission on International Trade

¹⁶² See Greenberg, *supra* note 17, at 307, 318, 330; Lillich, *supra* note 37, at 115, 121.

¹⁶³ Statement by Jerome J. Shestack in the Third Committee of the General Assembly, summarized in UN Doc. A/C.3/35/SR.56, at 12-14 (1980).

¹⁶⁴ A detailed critique of this process is outside the scope of this essay. See generally Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AJIL 754 (1982); Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AJIL 607 (1984).

¹⁶⁵ On the mandate and legislative techniques of the ILC, see 2 REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS, UN Doc. ST/LEG/SER.B/21, at 183-223 (prov. ed. 1982).

Law¹⁶⁶ or the International Labour Organisation¹⁶⁷ would have produced a significantly better product.

In evaluating the Convention, it is ultimately necessary to distinguish between several different problems. One is deficient drafting. Another is policies with which we may disagree but which faithfully reflect the political wishes of the majority, e.g., with regard to the value of the freedom of speech, association or private life in relation to other values. Third, there is the problem of the Convention's far-reaching goals, some of which do not lend themselves to speedy and full implementation even in developed and sympathetic countries. It has already been observed that the Convention was intended to be, in its operative provisions, a "maximalist"¹⁶⁸ instrument. Perhaps the majority of the United Nations wanted to adopt an ambitious set of goals, a program, without worrying too much about the prospects for full implementation in the immediate future. *Demandeur le plus pour obtenir le moins*. Some observers would say that this breeds disrespect for the law. But others would maintain that laws not only should reflect the mores of the community, but should be a catalyst for progress, for ever higher standards; that they should lead, not follow. There is, of course, constant tension and interaction between the behavior of the community and its norms of conduct. Pollock has observed that to be respected, law must express, on the whole, the conscience of the community.¹⁶⁹ Law can either lag behind public opinion or be in advance of it. Rules of law may elevate the standard of current morality: "The moral ideal present to lawgivers and judges, if it does not always come up to the highest that has been conceived, will at least be, generally speaking, above the common average of practice; it will represent the standard of the best sort of citizens."¹⁷⁰ Similarly, Professor Schachter, discussing De Visscher's statement that custom is established not only through "counting the observed regularities, but . . . weighing them in terms of social ends considered desirable," observes that governmental lawmaking conferences do not operate only through an inductive process, but include "as a necessary element a teleological factor which distinguishes the acceptance of certain patterns of conduct as law from the mere observation and recording of regularities of behaviour . . . a collective judgment of the states . . . which implicitly recognizes the contemporary social value of the rules in the text."¹⁷¹

Was the Charter of the United Nations adopted by a community that really practiced the values stated in it? Or was it rather a code of *better* conduct of nations? To pave the way for greater respect for human rights

¹⁶⁶ On the mandate and legislative techniques of UNCITRAL, see *id.* at 224-36.

¹⁶⁷ On the mandate and legislative techniques of the ILO, see *id.* at 237-58.

¹⁶⁸ Schwelb, *supra* note 4, at 1057.

¹⁶⁹ F. POLLOCK, *JURISPRUDENCE AND LEGAL ESSAYS* at xlii (A. Goodhart ed. 1978).

¹⁷⁰ *Id.* at 26.

¹⁷¹ Schachter, *The Nature and Process of Legal Development in International Society*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 745, 777 (R. Macdonald & D. Johnston eds. 1983).

and human dignity,¹⁷² human rights instruments must be more advanced than the mores of the community. It is reasonable for the Convention to establish standards that are more enlightened than those actually followed by most states. But how far in advance should human rights instruments be? Idealism should not be confused with utopia. Too great a distance will discourage acceptance and cause a proliferation of reservations. Whenever human rights instruments are drafted, this question deserves to be on the "conceptual agenda" of the lawmakers.

¹⁷² See generally Schachter, *Human Dignity as a Normative Concept*, 77 AJIL 848 (1983).

ECONOMIC DEVELOPMENT AND SOVEREIGN IMMUNITY

*By Georges R. Delaume**

Both the rules of sovereign immunity and the law of economic development are undergoing a noteworthy evolution. Both have inspired an abundant literature. Yet, for the most part, the literature in point approaches each subject individually and makes no attempt to consider whether the rules obtaining in one discipline might affect those of the other.

Occasionally, certain well-known and controversial awards, such as the *ARAMCO* and *TOPCO* decisions,¹ have relied on notions of sovereign immunity to justify the "internationalization" of proceedings relating to economic development disputes. Occasionally also, domestic courts faced with immunity issues have found support in United Nations resolutions² to sustain their holdings.³

Nevertheless, these decisions are few and not necessarily conclusive. More than a few arbitrators have refused to follow the *ARAMCO/TOPCO* reasoning,⁴ and, perhaps because the binding character of United Nations resolutions is still the object of controversy,⁵ most domestic decisions on immunity matters have been rendered on the basis of other considerations.

* Senior Legal Adviser, International Centre for Settlement of Investment Disputes (ICSID). The views expressed in this article are those of the author and do not necessarily represent those of ICSID.

¹ *Saudi Arabia v. Arabian American Oil Co. [ARAMCO]*, Aug. 23, 1958, 27 ILR 117, 155 (1963); *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, Jan. 19, 1977, 17 ILM 3 (1978), 53 ILR 389 (1979), para. 13 [hereinafter cited as *TOPCO* award].

See G. DELAUME, *TRANSNATIONAL CONTRACTS*, ch. XIV, para. 14.04 (1975-).

² In particular, the General Assembly resolutions concerning Permanent Sovereignty over Natural Resources, No. 1803 (XVII), 17 UN GAOR Supp. (No. 17) at 15, UN Doc. A/5217 (1962); the Establishment of a New International Economic Order, No. 3201 (S-VI), 28 UN GAOR Supp. (No. 1) at 3, UN Doc. A/9559 (1974); and the Charter of Economic Rights and Duties of States, No. 3281 (XXIX), 29 UN GAOR Supp. (No. 31) at 50, UN Doc. A/9631 (1974).

³ See *International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 477 F.Supp. 553 (C.D. Cal. 1979).

⁴ *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, Mar. 15, 1963, 35 ILR 136 (1967); *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic*, Oct. 10, 1973, 53 ILR 297 (1979). See also the awards referred to in note 5 *infra*.

⁵ See, e.g., the *TOPCO* award, *supra* note 1; *Libyan American Oil Co. v. Government of the Libyan Arab Republic*, Apr. 12, 1977, at 99-113, 20 ILM 1, 55-58 (1981) [hereinafter cited as *LIAMCO* award]; *Kuwait and the American Independent Oil Co.*, Mar. 24, 1982, 21 ILM 976, para. 90(2) (1982); *Framatome v. Atomic Energy Organization of Iran*, Apr. 30, 1982, 111 JOURNAL DU DROIT INTERNATIONAL [JDI] 58 (1984) (published in English translation without the names of the parties in 6 Y.B. COM. ARB. 94 (1983)).

Similarly, treaty and statutory developments concerning each subject have occurred in an atmosphere of almost total disregard for the other. Bilateral investment protection treaties and domestic investment laws do not refer to immunity.⁶ The only exception to this general rule is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which disallows immunity from suit for investment disputes within its scope, but leaves aside immunity from execution.⁷ As for the law of sovereign immunity, the European Convention on State Immunity⁸ and the State Immunity Act (SIA) of the United Kingdom⁹ attempt to identify categories of transactions falling within the concept of "commercial" activities of states, but do not specifically include economic development relationships in any category. The situation is even more opaque under the Foreign Sovereign Immunities Act (FSIA)¹⁰ and the Canadian State Immunity Act (Canadian SIA),¹¹ whose broad definitions of the "commercial" activities of states leave much to the discretion of the judiciary.

See also, e.g., White, *Expropriation of the Libyan Oil Concessions—Two Conflicting International Arbitrations*, 30 INT'L & COMP. L.Q. 1 (1981); Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AJIL 437 (1981); von Mehren & Kourides, *International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Cases*, id. at 476; Oppetit, *Arbitrage et contrats d'Etat: L'Arbitrage Framatome et autres c. Atomic Energy Organization of Iran*, 111 JDI 37 (1984); Lalive, *Contrats entre Etats ou entreprises étatiques et personnes privées—Développements récents*, 181 RECUEIL DES COURS 13 (1983 III).

⁶ The ICSID Secretariat has compiled a collection of *Investment Laws of the World* and another covering *Investment Treaties*, both in loose-leaf form; they are published by Oceana Publications, Dobbs Ferry, New York.

Bilateral investment treaties differ in this respect from commercial treaties, such as those regarding the status of Soviet Trade Delegations or FCN treaties. See G. DELAUME, note 1 *supra*, chs. XI, para. 11.02 and XII, para. 12.06.

⁷ See notes 97–103 *infra*. For the ICSID Convention, see 17 UST 1270, TIAS No. 6090, 575 UNTS 159.

⁸ 1972 ETS 74, reproduced in G. DELAUME, note 1 *supra*, App. 1, Booklet D, Aris. 4–14.

⁹ State Immunity Act 1978, ch. 33, reprinted in 17 ILM 1123 (1978), and in G. DELAUME, note 1 *supra*, App. 1, Booklet D. See §§2–12. Section 3(3) defines "commercial" transactions as follows:

In this section "commercial transaction" means—

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority. . . .

Note also that under section 3(1), the nonimmunity exception applies not only to commercial transactions (§3(1)(a)), but also to contractual obligations, "whether a commercial transaction or not," to be performed in the United Kingdom (§3(1)(b)). This last provision is patterned after Article 4 of the European Convention.

¹⁰ 28 U.S.C. §§1330, 1602–1611 (1982), reproduced in G. DELAUME, *supra* note 1, App. 1, Booklet D, §1603(d) and (e).

¹¹ Act to Provide for State Immunity in Canadian Courts 1982, ch. 95, reproduced in 21 ILM 798 (1982), and in G. DELAUME, *supra* note 1, App. 1, Booklet D, sec. 5.

was under an obligation to transfer to the Iranian Treasury the profits that it made from sales of oil. The lower court rejected this argument.²⁰ It held that NIOC was an independent legal entity engaged in commercial activities and that, as such, it was not entitled to plead immunity. At the time of the attachment, the accounts maintained by NIOC were its own property under German law; the fact that, at some future time, NIOC might have to transfer its profits to the Iranian Treasury did not change this characterization. The Constitutional Court agreed with this reasoning. The Court emphasized that the proper characterization ought to be made exclusively under the German *lex fori* and that, even if Iran regarded the funds held by NIOC as earmarked for sovereign (i.e., budgetary) purposes, the German courts were entitled to ignore the Iranian classification.²¹ In passing, the Court also noted that the link required by section 1610(a)(2) of the FSIA between the property subject to execution and the commercial activity upon which the claim was based had no counterpart in other immunity statutes (such as the SIA and the Canadian SIA) and was foreign to German law.²²

In *Corporacion del Cobre v. Société Braden Copper Corp.*,²³ a French decision by a lower court, Braden Copper had attached the proceeds of sales of copper made by the Chilean National Copper Co. (Cobre), to which former assets of Braden had been transferred following the expropriation by Chile of Braden's interests in the El Teniente copper mine. Cobre moved to vacate the attachment and pleaded immunity from both jurisdiction and execution.

The plea of immunity from jurisdiction failed. The court acknowledged that Cobre's "unique specialized vocation" was to promote the production and commercialization of Chilean copper and its by-products, as well as to regulate the copper market, both in Chile and between Chile and other countries. The court also noted that, even though Cobre had its own juridical personality, it was acting on behalf of Chile "for the management and exploration of the nationalized domain." Notwithstanding these

²⁰ Judgment of May 11, 1981, Court of Appeals, Frankfurt, 1981 NEUE JURISTISCHE WOCHENSCHRIFT 2650, summarized in 77 AJIL 159 (1983).

²¹ The Court said:

Credit balances in accounts with banks in the forum state and earmarked for transfer to an account of this state with its central bank to meet the budget of a foreign state do not reach their decisive purpose according to the intention of the foreign state until the credit balances reach the power of disposal of the central bank. With the instruction to transfer the credit balance to the central bank, at best indirect sovereign purposes are pursued. From an international law aspect, the forum state would not have to classify the credit balances as serving sovereign purposes even though after their receipt in the account of the foreign state at its central bank they were used for purposes that can be classified as sovereign. The practice of the states in the field of immunity law does not indicate that such a classification is required under international law at the time decisive here.

²² ILM at 1305.

²³ *Id.* at 1304.

²³ Judgment of Nov. 29, 1972, Trib. gr. inst., Paris, 100 JDI 227 (1973), 12 ILM 182 (1973).

findings, the court held that, particularly in regard to international transactions, Cobre carried on business in a commercial fashion and, therefore, that it was not entitled to claim immunity from suit for commercial operations like the sale of copper in question.

In regard to immunity from execution, the court held that supplementary information was necessary before that issue could be decided. Consequently, the court appointed a third party to determine, on the basis of all relevant facts, the ultimate destination and effective use of the funds derived by Cobre from its commercial activities.²⁴

Presumably, similar results would obtain under the SIA since under the British statute, "separate entities" are not, in principle, entitled to immunity.²⁵

The United States Cases. So far, the United States has characterized activities relating to the exploitation of natural resources much more restrictively than European countries.

In *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC)*,²⁶ suit was brought against member countries of OPEC for allegedly conspiring to manipulate oil prices in violation of U.S. antitrust laws. The action was dismissed by the district court on the ground that the activities involved were of a sovereign nature. The decision was affirmed by the Court of Appeals for the Ninth Circuit, but on act of state grounds. In reaching its decision, the district court relied on a number of considerations based on both international and U.S. law.

As to international law, the court acknowledged that the "United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources";²⁷ and that:

²⁴ A similar result emerged from the attempts by the Libyan American Oil Co. to enforce the LIAMCO award in various countries, including France. See note 5 *supra*. In France, the award was granted recognition, but the court vacated the attachments of Libyan assets, including those of Libyan instrumentalities or agencies. At the same time, the court appointed a committee of three independent persons to ascertain whether the attached assets were used for commercial or sovereign activities. See *Procureur de la République v. Société LIAMCO*, Judgment of Mar. 5, 1979, Trib. gr. inst., Paris, 106 JDI 857 (1979). See Rambaud, *Les Suites d'un différend pétrolier: L'Affaire LIAMCO devant le juge français*, 1979 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 820.

The French proceeding (like those in Sweden and in the United States) was discontinued following an amicable settlement between LIAMCO and Libya. See also notes 79-83 *infra*.

²⁵ See note 13 *supra*. Delaume, *The State Immunity Act of the United Kingdom*, 73 AJIL 185, 188, and 194 (1979). Note also that the view has been advanced that "even a mining concession agreement, though not a contract within the category of contracts mentioned in (b), would be a commercial transaction, because it would be 'any other transaction . . . into which a State enters'." Mann, *The State Immunity Act 1978*, 50 BRIT. Y.B. INT'L L. 43, 52 (1979). If this view is correct, it might mean that a state itself, as distinguished from a "separate entity," might not enjoy immunity in regard to disputes with foreign concessionaires.

²⁶ 477 F.Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

²⁷ 477 F.Supp. at 567 (referring to UN General Assembly Resolutions Nos. 1803, 3821, 3201, 3171, 3016 and 2158).

The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples.²⁸

The court also found that U.S. precedents regarding state programs²⁹ and federal intervention³⁰ in the marketing of natural resources supported the same conclusion.

With these considerations in mind, the court held:

In view of our own State and Federal domestic crude oil activities, there can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity. Plaintiff, however, asserts that, while this may be true, the actions of the OPEC nations in coming together to conspire to fix prices is commercial and, thus, not immune. Plaintiff's position, however, is untenable. It is ridiculous to suggest that the essential nature of an activity changes merely by the act of two or more countries coming together to agree upon how they will carry on that activity. The action of sovereign nations coming together to agree on how each will perform certain sovereign acts can only, itself, be a sovereign act. The act derives its authority and efficacy from the command of

²⁸ *Id.* at 568.

²⁹

We need not look beyond our own borders for examples of a government taking a determinative role in the marketing of its wealth and natural resources. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), involved an antitrust challenge to a California state program which controlled the marketing of raisins grown in the state, so as to restrict competition among the growers, and maintain prices. According to the defendants in that case (California officials), the activity was for the benefit and protection of the public welfare. The Court, in reversing the grant of injunctive relief to plaintiff, held that the program was "an act of government," *Id.* at 352, 63 S.Ct. 307. . . .

Id.

³⁰

Similar activity has been carried on by other States and the Federal Government in this country. The discovery of the East Texas Oil Field in the early 1930's led to distressing conditions in the crude oil industry. This new oil became a drug on the market and was being sold for as little as 10 cents a barrel in Texas, at a time when the price throughout the country had soared to more than \$3.00 a barrel. The State of Texas and other States, had, in order to prevent waste, and to conserve their natural resources, passed certain statutes and imposed restrictions requiring proration, and limiting the quantities that could be taken from the wells in various fields. The Federal Connally Hot Oil Act, 49 Stat. 30, 15 U.S.C. §715, *et seq.*, was enacted by the Congress to enforce the state statutes, by prohibiting the shipment in interstate commerce of crude oil produced in violation of state laws and regulations. *United States v. Brumfield*, 85 F.Supp. 696, 699 (W.D.La. 1949). Thus, certain States in the United States have restricted production of crude oil in order to maintain and stabilize prices and, thereafter, the Federal Government not only acquiesced in this activity, but made the States' acts effective by the assistance of Federal law enforcement.

Id.

the sovereign nation and is not intended to operate or become effective without that command.

In view of all the evidence presented, this Court finds that the activity carried on by the defendant OPEC member nations is *not* "commercial activity;" that, therefore, defendants are entitled to immunity under 28 U.S.C. §1604; and that, consequently, this Court lacks subject matter jurisdiction under 28 U.S.C. §1330(a).³¹

International Association of Machinists was followed in *Rios v. Marshall*.³² Plaintiffs, migrant farm workers, sued several New York apple growers, on the ground that the defendants had conspired among themselves and with an instrumentality of Jamaica (the British West Indies Central Labor Organisation, BWICLO) to replace plaintiffs with foreign workers from Jamaica. They also sued the Government of Jamaica for the acts of BWICLO. The action was dismissed on the ground, inter alia, that BWICLO and Jamaica were entitled to immunity. Finding that the FSIA definition of "commercial" activity was "elusive," the court nevertheless held that BWICLO's activities were noncommercial acts. To buttress that decision, the court recalled that the court in *International Association of Machinists* had held that the "removal of natural resources" from the territory of a state was a sovereign act. On the basis of this precedent, the court found that "in the instant case BWICLO's acts were the equivalent of establishing the terms for the temporary removal of manpower resources from its territory,"³³ and were therefore acts of a sovereign nature.

To say the least, the parallel between the manipulation of oil prices by OPEC countries and BWICLO's policies regarding migrant workers is not self-evident. Price manipulation, whether in regard to oil or other commodities, is not monopolized by governments since it is also engaged in by private corporations. Therefore, OPEC's price-fixing activities might have been characterized as "commercial" activities even though their "purpose" was clearly to serve governmental objectives. The immigration policies of a government, however, are clearly of a "sovereign" nature even if, as might have been the case in *Rios*, the ultimate "purpose" of those policies is to satisfy certain economic interests comparable to those that may be taken into account by a private company in its recruitment policies.

These decisions have no European counterparts. However, the *Matter of SEDCO*³⁴ provides elements of comparison. Action was brought in a federal district court against PEMEX (Petróleos Mexicanos) following the 1979 oil well disaster in the Bay of Campeche and the resulting pollution of the beaches of Texas. PEMEX moved to dismiss on the ground that it was a governmental agency entrusted with the exploration and exploitation of Mexico's hydrocarbon resources and that, as such, it was entitled to immunity. The motion succeeded. The court noted:

³¹ *Id.* at 568-69.

³² 530 F.Supp. 351 (S.D.N.Y. 1981).

³³ *Id.* at 372.

³⁴ 543 F.Supp. 561 (S.D. Tex. 1982), 21 ILM 318 (1982).

Petroleos Mexicanos was created in 1938 as a decentralized governmental agency charged with the exploration and development of Mexico's hydrocarbon resources. Unlike in the United States, the government of Mexico owns its country's natural resources, in particular, its hydrocarbon deposits. Mex. Political Const. art. 27. The Regulatory Law passed pursuant to the Mexican Constitution specifically creates a national oil company, Pemex, to implement the National Development Plan for hydrocarbon resources. Pemex is not privately owned and is governed by a council (Consejo de Administración) composed of Presidential appointees. Decisions made by the governing council are made in furtherance of Mexican National policy concerning its Petroleum resources. Beyond a doubt, Pemex is a "foreign state" as contemplated by §1603(a) of the FSIA.³⁵

The court considered next whether PEMEX was engaged in a commercial activity when it performed the acts complained of by the plaintiffs, and acknowledged that this was "a difficult issue." The court resolved the issue in favor of PEMEX on the grounds that PEMEX's activities played an integral part in the making of Mexican policy on the production and utilization of state-owned minerals, and that PEMEX acted by authority of national law within Mexico's territory and in intragovernmental cooperation with other branches of the Mexican Government. The court buttressed its decision by adding:

The FSIA requires the Court to focus on the specific act by a foreign state made the basis of the lawsuit. The Court must regard carefully a sovereign's conduct with respect to its natural wealth. A very basic attribute of sovereignty is the control over its mineral resources and *short of actually selling these resources on the world market*, decisions and conduct concerning them are uniquely governmental in nature [referring to *International Association of Machinists*]. Because the nature of Pemex' act in determining the extent of Mexico's natural resources was uniquely sovereign, this Court finds that the commercial activity exception to the FSIA, §1605(a)(2), is inapplicable to the facts presented by this case [emphasis added].³⁶

This decision is open to serious question. As the italicized words in the above quotation indicate, the court seems to have made a distinction between the activities of PEMEX regarding the exploration of mineral deposits (characterized as sovereign activities) and the possible sale by PEMEX of "these resources on the world market" (which might qualify as a commercial activity).³⁷

³⁵ *Id.* at 565. Compare *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979), in regard to the National Oil Corp. of Libya, considered as a foreign state.

³⁶ 543 F.Supp. at 566.

³⁷ This interpretation finds additional support in the words of the Court:

Pemex had not entered into a contract with anyone for the oil and gas produced from the IXTOC I well, nor had it contracted with a United States business to drill the well. In fact, Pemex was attempting to determine if deposits of oil and gas were located offshore under Campeche Bay.

Such a distinction appears artificial. It ignores the fundamental unity of oil operations. One does not undertake the costly and risky business of exploration without the hope that it will be successful and lead to profitable exploitation. Although the two phases of oil ventures are distinguishable in point of time, their ultimate and paramount objective is the commercialization of oil resources and derivative products. In this respect, the operations of national oil companies do not substantially differ from those of private oil companies, and any disparity in the means available to them in the exploration phase should have no bearing on their community of thinking regarding the exploitation and marketing of oil once oil has been found.

A comprehensive grasp of the oil industry, regardless of the private or public character of the operation, should therefore have prompted the *SEDCO* court to characterize PEMEX's activities as "commercial." Here the reasoning of the European courts in the cases discussed above³⁸ appears closer to the mark. One can only hope that, in circumstances possibly less sensitive than those surrounding the *SEDCO* litigation, other American courts will reconcile their thinking with that prevailing on the European shores of the Atlantic.

Promotional Economic Activities

Tourism and Related Industries. To promote tourism and related activities that earn foreign exchange, many countries operate, directly or through specialized agencies, tourism offices, hotels and transportation facilities. Whether such activities should be characterized as "commercial" or "governmental" is not always clear from the reported cases because some of them skirted the issue and were decided on other grounds.

Typical in this respect is *Société Hôtel George V v. Etat Espagnol*.³⁹ The Spanish Tourism Agency, an emanation of the Ministry of Tourism in Madrid, had rented premises in a Parisian hotel. The premises were to be used to promote tourism, publicity, and the sale of railway and airline tickets. When the lease terminated, the lessor refused to renew it on the

³⁸ Especially the *Corporacion del Cobre* case, note 23 *supra*. No decision on the subject has yet been rendered in the United Kingdom following the entry into force of the SIA. In his analysis of the SIA, Mann intimates that the courts in the United Kingdom might follow the path opened by continental courts:

[T]he British National Oil Corporation as at present constituted certainly exercises far-reaching authority over oil. But can it be suggested that its authority is sovereign? Even if something in the nature of governmental authority were sufficient, this is vested in the Minister of Energy. It would seem, therefore, that it can only be in rare circumstances that a separate entity will be entitled to immunity.

Mann, *supra* note 25, at 61.

³⁹ Judgment of Jan. 17, 1973, Cass. civ. 1re, 63 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 125 (1974).

The District Court of Frankfurt had no hesitation in holding that the activities in Germany of the Spanish Tourist Bureau were acts of a private nature. *See X v. Spanish Government Tourist Bureau*, Judgment of June 30, 1977, in *MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY*, UN Doc. ST/LEG/SER.B/20, at 294 (1982).

ground that the lessee did not use the premises for the purposes stated in the lease. The lessee refused to vacate the premises, which gave rise to an action for its eviction by the lessor. The lessee then pleaded immunity. The plea was denied on the ground that in both form and substance, the lease was a purely commercial contract. By way of dictum, the Court of Cassation said that, even if the Spanish Government considered the role performed by the agency as an extension of its own promotional activities, and therefore as fulfilling a governmental function, this would not change the outcome of the dispute. According to the Court, in signing the lease on a purely commercial basis, the Government could not be considered as having acted in a sovereign capacity. Nevertheless, the narrow ground for this decision leaves unresolved the true characterization of the Government's promotional efforts in the field of tourism.

*Harris v. VAO Intourist Moscow*⁴⁰ is also inconclusive, albeit for different reasons. Action was brought against two Soviet agencies and the USSR to recover damages for the alleged wrongful death by fire of an American tourist in a Moscow hotel. One of the agencies involved was Intourist, Moscow, a Soviet instrumentality vested with authority to establish hotels, which operated the hotel in which the fire occurred. The other agency was VAO Intourist, New York, which was created in Moscow as a state-owned entity, but maintained offices in New York to promote tours from the United States to the Soviet Union and encourage the use of Intourist's hotel facilities.

The action was dismissed on two grounds. First, the court found that a letter from the Soviet Ambassador claiming immunity for each defendant had a "persuasive quality" and led to the conclusion that immunity had not been waived. Second, the court held that, even if the defendants' activities were characterized as "commercial," the cause of action arose out of events in Moscow, which could not be considered as having a "direct effect" in the United States to satisfy the requirements of section 1605(a)(2) (third clause) of the FSIA.⁴¹ In this last respect, *Harris* may still

⁴⁰ 481 F.Supp. 1056 (E.D.N.Y. 1979).

⁴¹ The court acknowledged that "[o]bviously the negligent operation of a hotel in Moscow causing the death of a United States resident has effects on the United States; here it leaves aggrieved relatives in this country." *Id.* at 1062. However, the court held that "[i]ndirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the 'direct effect' requirement of section 1605(a)(2)." *Id.*

Referring to *Upton v. Empire of Iran*, 459 F.Supp. 264 (D.D.C. 1978), which involved an action for wrongful death and personal injury due to the collapse of the roof of an airline terminal in Tehran, Iran, the court said:

Despite all this legislative history and statutory and case law, the concept of "direct effect" remains elusive. But, when traced through the more restrictive view applied to relevant long-arm provisions of the District of Columbia, Virginia, Maryland and the Uniform Act, it is reasonable to hold that section 1605(a)(2) of title 28, adopted as part of the Immunities Act, was designed to restrict the exercise of the potential jurisdictional power of American courts to tortious activities outside this country which have a "substantial" impact in the United States.

481 F.Supp. at 1065.

be "good law." However, in the light of the *Gibbons* case, which is discussed below,⁴² one wonders whether, at least in regard to entities such as VAO Intourist (New York), the courts would be as willing as the *Harris* court was to decline jurisdiction.

For one type of touristic promotional activity, namely, that relating to air transportation, the courts have shown little hesitation in holding that it constitutes "commercial" acts and that national airlines are not entitled to immunity from suit.⁴³

Foreign Investment. To attract foreign investment, many states have enacted investment laws and have concluded bilateral treaties for the promotion and protection of investments.⁴⁴ In addition, certain countries have set up instrumentalities to perform promotional activities in other countries.

The nature of these activities was recently considered in *Gibbons v. Udaras na Gaeltachta*,⁴⁵ which involved a suit brought by American plaintiffs against two Irish instrumentalities, the Industrial Development Authority of Ireland (IDA) and Udaras na Gaeltachta (UG) (successor to another Irish entity referred to as GE in the judgment), set up to encourage and further the economic development of certain Gaelic-speaking areas of Ireland. Projects sponsored by these institutions were eligible for various forms of governmental assistance. IDA maintained an office in New York City. GE (UG) had no office in the United States, but used the New York

⁴² See text and notes 45-47.

⁴³ *Sugarman v. Aeromexico*, 626 F.2d 270 (3d Cir. 1980). See also *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980). In that case, the plaintiff had purchased passage on the Dominican national airline for a package tour from Miami to the Dominican Republic. He had been denied access to the Republic by immigration officials and compelled to leave the country, first for Puerto Rico and second for Haiti, where no further transportation was provided and he had to make his own arrangements to return to Miami. In an action for damages for breach of contract, the airline pleaded immunity. The airline admitted that the sales of tickets and "tourist cards" (permitting entry to the Republic) carried on in the United States constituted commercial acts. It argued, however, that the claim arose not from this commercial activity, but from the acts of Dominican immigration officials, in which the airline was compelled by those authorities to participate. In that regard, the airline acted merely as an arm or agent of the Dominican Government and, as such, was allegedly entitled to the same immunity from any liability arising from that governmental function as would inure to the Government itself. The court did not agree. It held that, under the law of Florida, a common carrier is required to exercise the highest duty of care, foresight, prudence and diligence toward its passengers and that such duty included warning the passenger that he might be prevented by immigration officials from entering his country of destination. Under the circumstances, the court allowed the action to proceed.

Other "airline cases" are primarily concerned with the question whether actions against foreign states and their agencies should be tried with or without a jury. See, e.g., *Icenogle v. Olympic Airways*, 18 ILM 963 (1979) (D.D.C. 1979); *Herman v. El Al Israel Airlines*, 502 F.Supp. 277 (S.D.N.Y. 1980).

⁴⁴ See note 6 *supra*.

⁴⁵ 549 F.Supp. 1094 (S.D.N.Y. 1982). Originally, the action had been brought not only against the defendants, but also against the Republic of Ireland, in the District Court for the District of Columbia. The court dismissed the action against the Republic and ordered transfer of the case to the District Court for the Southern District of New York. See *Gibbons v. Republic of Ireland*, 532 F.Supp. 668 (D.D.C. 1982).

office of IDA. In the seventies, the plaintiffs conducted negotiations in New York and in Ireland with the defendants; the plaintiffs and GE agreed to enter into a joint industrial venture in the form of an Irish company. The venture failed, allegedly because of false statements by IDA and nonperformance by GE. The legal implications of the claim against GE will be discussed in another context.⁴⁶

As for the claim against it, IDA moved to dismiss on the ground, *inter alia*, that its activities in the United States were not of a commercial nature. In denying the motion, the district court said:

While it may well be, as defendants argue, that IDA exists in order to serve a purpose integral to the Irish government's plans for Ireland's economic development, the promotional activities that IDA generally performs and allegedly engaged in here are, *by nature*, no different at all from the promotional activities engaged [*sic*] by a private public relations firm. Just as a private public relations firm might refer a prospective customer to its principal and might lend its principal the use of its offices or its personnel for the purpose of facilitating the principal's efforts to reach an agreement with the prospective customer, so here IDA allegedly referred plaintiffs to GE and then gave plaintiffs and GE use of its New York City office and its personnel for the purpose of facilitating their efforts to reach an agreement. Thus, IDA's conduct in bringing about the conclusion of the Joint Venture Agreement was just as commercial *in nature* as GE's conduct in participating in the Joint Agreement.⁴⁷

Having made this characterization, the court had little difficulty in concluding that IDA's commercial activity was "carried on" in the United States within the meaning of section 1605(a)(2) (first clause) of the FSIA, and that it could therefore entertain the claim against IDA.

Joint Ventures

The terms of the agreement between Gibbons and GE were characteristic of joint ventures of this kind. Gibbons was to form an Irish company

⁴⁶ See the subsection of this section, "Joint Ventures," *infra*.

⁴⁷ 549 F.Supp. at 1110-11. In this connection, the court also referred to *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982). *Gilson*, too, involved an action against not only the Republic of Ireland, but also IDA, GE and other Irish defendants, some of whom were accused of usurpation of patent rights and equipment owned by the plaintiff. The action against the Republic was dismissed. In regard to the claim against GE, the court said:

[T]he complaint alleges an unbroken chain of events beginning when plaintiff contracted with defendant GE in the United States, with the participation of defendant IDA's New York office, and involving the active collusion of all defendants to entice plaintiff to leave the United States for Ireland. Does this sequence of events yield an action within the exceptions enumerated in section 1605 to section 1604's general rule of immunity?

We believe that, if all this happened in the way plaintiff alleges, it does. In particular, we think the case would fall within clause 2 of section 1605(a)(2), that we would have before us an action based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. . . ." The "act performed in the United States" is the enticement, the "commercial activity of the foreign state elsewhere" is the quartz crystal business in which plaintiff and defendants were involved.

Id. at 1027.

(IPC) to manufacture and export plastic cosmetics containers. Gibbons agreed (1) to purchase the necessary machinery in the United States and arrange for its delivery to Ireland; (2) to hold at least 74 percent of the company's outstanding stock; (3) to move to Ireland to act as the principal directors and officers of the company; and (4) to hire primarily Gaelic-speaking individuals as employees of the company. GE agreed (1) to lease the company a factory and three four-bedroom houses located in County Galway, Ireland; (2) to give the company a capital grant in the lesser amount of \$420,000 or 60 percent of the cost of any machinery necessary to equip the factory for the manufacturing process contemplated by the parties; (3) to give the company a second capital grant of up to \$72,000, to be used towards the cost of training employees to work in the factory; and (4) to purchase 26 percent of the outstanding stock of the company up to a total equity investment of \$71,000.

The parties also entered into a Lease Agreement, under which GE leased a certain factory to the plaintiffs, and a Machinery Capital Grant Agreement setting forth the terms and conditions of a grant made by GE for the import of equipment.

Disputes began to arise between plaintiffs and GE almost immediately after IPC began to operate. According to the plaintiffs, the factory did not meet specifications and was not ready for occupancy at the time promised. GE did not provide the promised training capital grant and repeatedly withheld payments under the machinery capital grant. IPC had to borrow funds that it had expected from GE, from the plaintiffs and the Bank of Ireland.

After 2 years of production, IPC failed to make profits and defaulted on its loan from the Bank of Ireland, which called the loan. In 1980 IPC ceased production and was placed in receivership soon thereafter. As a result, the plaintiffs alleged that they had lost half a million dollars.

The court held that GE's conduct in participating in the joint venture clearly constituted "commercial activity" within the meaning of the FSIA,⁴⁸ and that this activity had sufficient contact with the United States to satisfy the requirements of section 1605(a)(2) of the FSIA. The defendants did not seriously challenge the characterization. They argued, however, that the court had no personal jurisdiction over them and that, even if the court had jurisdiction, the court should decline it on the basis of *forum non conveniens* because plaintiffs and defendants were involved in

⁴⁸ The court said:

Every obligation undertaken by GE in the Joint Venture Agreement contemplated activity in which, by nature, a private party could engage; viewed as a whole, the Joint Venture Agreement was, by nature, precisely the sort of activity that an individual might customarily carry on for profit. Given the "nature-of-the-act test" for commerciality that has been codified in the FSIA, it is of no relevance to the Court's analysis that GE did not enter into the Joint Venture Agreement with the purpose of achieving pecuniary gain. Rather, the controlling factor is that the Joint Venture Agreement is by nature a transaction that could just as easily have been entered into by a private party and could just as easily have been undertaken for a pecuniary rather than a public purpose.

similar litigation in the Irish courts. None of these arguments succeeded. In particular, the court emphasized that there was no reason to conclude that the enactment of the FSIA evidenced any congressional intent to curtail the doctrine of *forum non conveniens* in sovereign immunity cases.⁴⁹

*Maritime International Nominees Establishment [MINE] v. Republic of Guinea*⁵⁰ concerned a dispute arising out of a joint venture agreement between MINE, a Liechtenstein corporation, and Guinea. The venture had taken the form of a shipping company incorporated in Guinea whose purpose was to transport bauxite mined in Guinea to foreign markets. The agreement between the parties provided for ICSID arbitration; hence the case has been discussed primarily in connection with the autonomous character of the ICSID machinery and its total independence from interference by the domestic courts of contracting states.⁵¹ All that needs to be said here is that, after holding that, by consenting to ICSID arbitration, Guinea had not waived its immunity from suit for the purposes of section 1605(a)(1) of the FSIA, the Court of Appeals for the District of Columbia Circuit considered whether the negotiations surrounding the formation of the joint venture or the circumstances of its termination offered sufficient contacts with the United States to deny Guinea immunity under section 1605(a)(2) of the FSIA. The court answered these questions negatively. It held that Guinea did not have an agent in the United States and had not "carried on" any substantial activity in the United States, and that the alleged breach of the joint venture agreement did not have a "direct effect" on the United States.

Both *Gibbons* and *MINE* concern situations in which the commercial nature of the joint venture could hardly be questioned; but the recent decision of the French Court of Cassation in *Société Eurodif v. République Islamique d'Iran*⁵² presents a completely different situation.

The factual background of this case unfolded in the wake of the Shah's grand design to modernize the economy of Iran. The French and Iranian Governments had concluded cooperation agreements for the construction of an atomic plant in Iran. Enriched uranium, necessary for the operation of the plant, was to be supplied by Eurodif (a French corporation owned by the agencies of four European countries) to an Iranian agency (OIAETI) through another French company, Soditif, 60 percent of which was owned by the French Atomic Energy Agency (Commissariat français à l'énergie atomique, CEA) and 40 percent by OIAETI. As a sponsor of the project, the Iranian Government had agreed to lend a billion dollars and almost a billion francs to CEA, repayment of which was guaranteed by the French Government. In addition, CEA and OIAETI undertook to provide Soditif with working capital.

⁴⁹ *Id.* at 1119.

⁵⁰ 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S.Ct. 71 (1984).

⁵¹ Delaume, *ICSID Arbitration and the Courts*, 77 AJIL 784 (1983); Note, *Jurisdiction, Sovereign Immunity*, 24 VA. J. INT'L L. 217 (1983).

⁵² Judgment of Mar. 14, 1984, Cass. civ., 1984 *Juris-Classeur périodique* [JCP] II 20,205, 23 ILM 1062 (1984).

Following the Iranian Revolution, the new Government decided to terminate the venture; it stopped disbursing the proceeds of the French franc loan (the dollar loan had already been drawn down) and refused to make working capital contributions to Soditif.

In accordance with an arbitral clause agreed by the parties, Eurodif and Soditif submitted claims to arbitration by the International Chamber of Commerce and garnished the sums due by CEA to Iran for the repayment of the loans. Iran appealed and argued that the basic transaction was a governmental act, and that its property was immune from measures of execution. Eurodif and Soditif demurred on the grounds that the transaction had a commercial character and that, by consenting to arbitration, Iran had implicitly waived its immunity from execution. This argumentation failed. The Court of Appeal of Paris held that, even if the proceeds of the loans had been intended to finance a commercial operation, the amounts due from CEA to Iran were general assets of Iran and should therefore be considered as governmental assets, and as such, immune from execution. The court also dismissed the argument that submission to arbitration amounted to a waiver by Iran of its immunity from execution.

On appeal, the Court of Cassation agreed that submission to arbitration does not, without more, constitute an implicit waiver of immunity from execution. However, the Court held that the appellate court had erred in completely disregarding the argument of Eurodif and Soditif about the commercial nature of the venture and the intended use of the loan made to finance it. The Court said:

Whereas the immunity from execution benefiting a foreign state is a matter of principle; nevertheless, the principle may be disregarded in exceptional circumstances;

Such is the case when the property attached was intended to be used for the economic or commercial activity of a private law nature upon which the claim is based.⁵³

In view of the governmental framework surrounding this transaction, the decision of the Court of Cassation is significant. It shows an awareness of the fact that, notwithstanding the identity of the participants and their motivation, the basic features of the transaction did not substantially differ from those of similar ventures associating a number of parties to carry out large and complex industrial projects.⁵⁴ By focusing attention exclusively upon the nature of the transaction, the Court gave it its proper characterization.

There is evidence that in reaching this decision, the Court was aware that it would bring French immunity rules closer to those of other

⁵³ 23 ILM at 1069.

⁵⁴ See, e.g., the EEC Guides on drawing up (1) Contracts for Large Industrial Works, (2) International Contracts on Industrial Co-operation and (3) International Contracts between Parties Associated for the Purpose of Executing a Specific Project. The Guides are reproduced in G. DELAUME, *supra* note 1, App. IV, Booklet D.

countries and, in particular, to the FSIA whose provisions were referred to by the Public Attorney in his speech before the Court. Indeed, the test formulated by the Court in regard to property subject to execution conforms to that set forth in section 1610(a)(2) of the FSIA. Under that provision, the property in the United States of a foreign state is not immune from execution if that property "is or was used" for the commercial activity upon which the claim is based. The above quotation from the judgment of the Court of Cassation mirrors that language almost word for word. Thus, *Eurodif* affords no relief to claimants engaged in commercial operations with a foreign state unless the assets of that state located in France relate to the transaction involved. In this respect, therefore, the *Eurodif* rule is more restrictive than those obtaining in the United Kingdom,⁵⁵ Canada⁵⁶ and Germany,⁵⁷ since in those countries any property of a foreign state used for commercial purposes is subject to execution, even when that property bears no relation to the transaction underlying the claim.

Economic Development Loans

States may borrow from public or private sources to finance economic development. When immunity issues are concerned, the distinction between public and private sources of finance has practical consequences.

Loans by public institutions, whether domestic or international, that specialize in lending for economic development purposes do not, as a matter of fact, raise issues of immunity. Public lending institutions solve the problem of immunity from jurisdiction by means of contractual stipulations providing for the submission of disputes to specific domestic courts⁵⁸ or to arbitration,⁵⁹ since such provisions are tantamount to a waiver of immunity from suit. In regard to immunity from execution, to the extent that the loan documents refer to this issue at all, which is rare, they leave the issue outstanding. In a typical example, the General Conditions of the World Bank acknowledge that if an award is not complied with by a borrowing member country and the Bank seeks to enforce the award against the borrower, enforcement will be possible only to the extent permissible under the relevant domestic immunity rules.⁶⁰

⁵⁵ SIA, *supra* note 9, §13(4).

⁵⁶ Canadian SIA, *supra* note 11, §11(1)(b).

⁵⁷ See the German NIOC case, *supra* note 19, 22 ILM at 1304.

⁵⁸ Such is the case in regard to loans made by most domestic public lending agencies and by the European International Bank.

⁵⁹ Such is the case with the World Bank and the Inter-American, Asian and African Development Banks.

⁶⁰ Section 10.04(k) of the General Conditions reads as follows:

If within thirty days after counterparts of the award shall be delivered to the parties the award shall not be complied with any party may enter judgment upon, or institute a proceeding to enforce, the award in any court of competent jurisdiction against any other party, may enforce such judgment by execution or may pursue any other appropriate remedy against such other party for the enforcement of the award and the provisions of the Loan Agreement or the Guarantee Agreement. Notwithstanding the

In practice, the spirit of mutual confidence and cooperation that characterizes these operations makes it most unlikely for sovereign immunity to become a serious issue in the relations between the parties. In fact, as far as this writer knows, no such issue has arisen in the post-World War II decades, which have witnessed the emergence and expansion of this type of lending.

The private sector, of course, is another matter. Private lenders have good reason to pay full attention to issues of sovereign immunity. Even though the restrictive doctrine of immunity has gained markedly in acceptance, at least in those countries where leading financial markets are located and the borrower is likely to have assets, the rules obtaining in these countries are not uniform. Before lenders can avail themselves of the restrictive doctrine, they must overcome a threshold issue of characterization, namely, whether the foreign borrowings made by states should be regarded as commercial or sovereign acts.

There is no consensus on this issue. All that can be said is that the commercial characterization is gaining ground in an increasing number of countries. The clearest example of this remark is found in section 3(3) of the SIA, which expressly includes "loans" in the definition of "commercial" transactions.⁶¹

The FSIA, unlike the bills which preceded it,⁶² does not specifically refer to financial transactions. However, recent decisions hold that loans contracted by foreign states and public entities fall within the commercial category.⁶³ Nevertheless, a significant difference remains between the FSIA and the SIA. Under the FSIA, the commercial exception applies only to loans made in the United States.⁶⁴ The SIA contains no similar limitation; the nonimmunity rule applies equally to loans made in the United Kingdom and to the borrowings of foreign states in markets outside the United Kingdom.

The situation in countries whose law is uncodified, such as Western continental countries, is not always clear because some of the decisions in point are old and may no longer be conclusive. Thus, in 1965 a French court held that the guarantee given by Turkey to bonds issued by the

foregoing, this Section shall not authorize any entry of judgment or enforcement of the award against any party that is a member of the Bank except as such procedure may be available otherwise than by reason of the provisions of this Section.

Reprinted in G. DELAUME, note 1 *supra*, App. IV, Booklet B, at 7 (1981).

⁶¹ See note 9 *supra*. The European Convention on State Immunity is not as specific as the SIA, but there is reason to believe that loans would fall within the scope of "contracts" referred to in Article 4 of the Convention.

⁶² See G. DELAUME, note 1 *supra*, ch. XI, para. 11.06.

⁶³ *Allied Bank Int'l v. Banco Credito Agrícola de Cartago*, 566 F.Supp. 1440 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 23 (2d Cir. 1984); *Jackson v. People's Republic of China*, 550 F.Supp. 869 (N.D. Ala. 1982), 22 ILM 75 (1983), *set aside* 23 ILM 402 (1984), *dismissed*, 596 F.Supp. 386 (1984). The latter decision is summarized *infra* at p. 456 and will be reprinted in ILM.

⁶⁴ The same approach is favored by Article 4 of the European Convention on State Immunity.

City of Constantinople should be regarded as partaking of the commercial nature of the city's borrowings and that neither the city nor the guarantor could claim immunity.⁶⁵ However, in the absence of cases in point,⁶⁶ it is not certain that the same characterization would apply to loans contracted for its own account by a foreign sovereign and that the French courts would agree with those of Belgium⁶⁷ that such transactions fall within the category of commercial acts.

In Switzerland, the borrowings of foreign states are regarded as commercial acts for which the borrower cannot claim immunity.⁶⁸ Yet this rule is limited in the sense that it applies only to transactions that have some connection with Swiss territory, e.g., as the place of issue or the place of payment. When there is no such connection, the Swiss courts decline jurisdiction and refuse to permit execution against the assets of foreign states.⁶⁹

The decisions referred to above dealt with conventional financial transactions; but there is no reason for economic development loans to be subject to different rules in regard to immunity issues.⁷⁰ These loans, notwithstanding their "purposes," remain by "nature" financial transactions. An Italian decision illustrates this remark.⁷¹ In 1957 (i.e., when Tripolitania was still under Italian rule), some Italian financial institutions made a loan to the Agrarian Consortium for Tripolitania. The proceeds of the loan were to be used by the consortium to lend financial assistance

⁶⁵ *Société Bauer-Marchal v. Ministre des Finances de Turquie*, Judgment of Feb. 10, 1965, Cour d'appel, Rouen, 92 JDI 655 (1965). See also, in the same case, Judgment of Dec. 19, Cass. civ. 1re, 1962 JCP II 12,489, quashing Judgment of Jan. 20, 1957, Cour d'appel, Paris, 84 JDI 392 (1957).

⁶⁶ Two decisions of the Court of Cassation are inconclusive in the sense that they dealt with issues of assumption of debt pursuant to peace treaties (*Faure et al. v. Etat Italien*, Judgment of Oct. 5, 1965, Cass. civ., 1966 JCP II 14,831) and succession to debt between Belgium and the (then) colony of the Congo (*Montefiore v. Association Nationale des Porteurs de Valeurs Mobilières*, Judgment of Nov. 21, 1961, Cass. civ., 1962 JCP II 12,521).

⁶⁷ *Mahieu, Brasseur et al. v. République Hellénique*, Judgment of May 24, 1933, Cour de Bruxelles, ch. 1re, 62 JDI 1034 (1935).

⁶⁸ *Hellenische Republik v. Obergericht Zürich*, Judgment of Mar. 28, 1930, Bundesgericht, 56 Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung [BG I] 237 (1930); *Royaume de Grèce v. Banque Julius Bär et Cie.*, Judgment of June 6, 1956, Bundesgericht, 82 BG I 75 (1956), 23 ILR 195 (1956); *Etat Yougoslave v. S.A. Sogerfin*, Judgment of Oct. 7, 1938, Bundesgericht, 61 La Semaine Judiciaire 327 (1939).

⁶⁹ Judgments of Mar. 28, 1930, and June 6, 1956, note 68 *supra*. See also Lalive, *Swiss Law and Practice in relation to Measures of Execution against the Property of a Foreign State*, 10 NETH. Y.B. INT'L L. 153 (1979).

⁷⁰ There are, of course, substantive differences between economic development loans and commercial loans. Institutions that specialize in economic development lending assume risks that private lenders cannot afford and have particularly close relationships with their respective borrowers regarding such matters as the allocation of the loan proceeds, the carrying out of the project involved and the manner in which the borrower manages its operation.

⁷¹ *Consorzio agrario della Tripolitania v. Federazione italiana consorzi agrari e Cassa di risparmio della Libia*, Judgment of Dec. 5, 1966, Corte cass. (en banc), 3 RIVISTA DE DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 602 (1967), reprinted in G. DELAUME, note 1 *supra*, App. III, Booklet D, at 39 (1984).

to Italian farmers in Tripolitania. The loan contract provided expressly for the submission of disputes to the courts in Rome. Following a default, the lenders brought suit in Rome, but the consortium pleaded sovereign immunity on the ground that it had become a Libyan public entity after independence. Considering that the transaction was of a commercial nature, the Court upheld its jurisdiction. The Court observed that, even if the consortium had become a Libyan public entity, to hold it immune from the jurisdiction of the Italian courts would amount to

depriving of any practical significance the distinction between acts done in a sovereign capacity and contractual acts of a private law nature, a distinction that Italian cases deem essential in order to solve jurisdictional issues involving foreign public entities; indeed, any activity carried on by a public entity is, in one way or the other, related to the institutional purpose of the entity in question and is intended to further the achievement of that purpose.⁷²

No other decision on the subject seems to have been reported,⁷³ which is not surprising. As will be seen in the next part of this paper, transnational lenders frequently insist upon solving the issue of characterization by defining the transaction involved as "commercial" and/or by including express waivers of immunity in the contract. Contractual techniques of "immunity avoidance" are thus placed in the service of protection from the uncertainties of immunity rules.

II. CONTRACTUAL REMEDIES AND IMMUNITY AVOIDANCE

To forestall the possible impact of immunity rules on the outcome of litigation with foreign states, the draftsman may use a series of contractual devices such as: (1) providing for the proper characterization of the transaction; (2) selecting an appropriate judicial or arbitral forum; and/or (3) drafting acceptable waivers of immunity. None of these alternatives, or a combination of them, can be selected in the abstract. "Immunity avoidance" can only be effective if the techniques used are tailored to the circumstances of each individual case.

⁷² As translated in G. DELAUME, note 1 *supra*, App. III, Booklet D, at 43.

⁷³ *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F.Supp. 615 (S.D.N.Y. 1979), is not conclusive in this respect. The corporation is an entity wholly owned by the Venezuelan Government, which gives it financial backing in the form of guarantees, whose purpose is to finance projects designed to stimulate Venezuelan economic development. In this case, the corporation sought a declaratory judgment as to the validity of guarantees given by it regarding two loan agreements between a Swiss lender and a Venezuelan borrower. The lender asserted that the loans were in default and counterclaimed for the award of principal and interest. It was found that the corporation's allegations of fraud had not been proven and that the lender was entitled to recover against the corporation, as guarantor of the loans. The corporation appealed and raised objections to the jurisdiction of the federal courts. (712 F.2d 33 (2d Cir. 1979)). On remand, jurisdiction was upheld on the ground that the corporation had waived its immunity by not raising it as a defense to the counterclaims.

Contractual Definitions

One way to avoid the pitfalls of characterization is to provide in the agreement that the transaction involved constitutes a "commercial" or "private" act. Provisions of this kind are found in transnational loan documents. The rationale for this approach to the problem is that, for the most part, lenders are firm believers in submitting loan disputes to domestic courts. Although, on occasion, they may accept arbitration as a means of settlement,⁷⁴ in the overwhelming majority of cases, lenders insist upon providing for the jurisdiction of their own courts, and possibly, as an additional option left to their discretion, for the jurisdiction of alternative forums.⁷⁵

To that end, the "commercial" definition stipulated by lenders makes sense. In effect, the definition makes it embarrassing for the borrower to challenge a characterization he had initially accepted. Furthermore, the courts in which lenders are likely to bring suit are those operating in the world's leading financial markets, i.e., in countries that endorse the restrictive doctrine of immunity. In the event of litigation, those courts would be most unlikely to substitute a characterization of their own for the "commercial" definition adopted by the parties.

For transactions other than loans, particularly economic development agreements, the situation is different. For example, the agreements concluded by Latin American countries and a number of Arab countries generally provide for the application of the law of the contracting state and the jurisdiction of its courts. In such cases, attempts to "commercialize" the characterization of the transaction would be unlikely to succeed and, in any event, would be of little practical value to the private party.

This does not mean that economic development agreements never contain contractual definitions of the transaction. Some do exist, but they differ from those used by lenders because they are not "immunity oriented" and are intended to achieve other purposes.

A practical illustration that comes to mind concerns economic development agreements that provide for the settlement of disputes by ICSID conciliation/arbitration. The ICSID Convention itself, which is intended to facilitate the settlement of investment disputes, does not define the term "investment." This lack of a definition, which was deliberate, has enabled the Convention to accommodate both traditional types of investment in the form of capital contributions and new types of investment, including service contracts and transfers of technology.⁷⁶ Nevertheless, in

⁷⁴ Delaume, *The ICSID and the Banker*, INT'L FIN. L. REV., October 1983, at 9.

⁷⁵ For examples of this type of provision, see G. DELAUME, note 1 *supra*, ch. XI, paras. 11.06 and 11.07.

⁷⁶ The adaptability of the Convention to new investment trends is apparent not only from the ICSID clauses in the archives of ICSID, but also from the nature of disputes effectively submitted to ICSID conciliation/arbitration.

As examples of disputes concerning traditional types of investment, one might mention disputes arising out of agreements relating to (1) the exploitation of natural resources, such

view of the novelty of certain types of investment and of the fact that the ICSID machinery is not available for the settlement of purely commercial disputes, the parties to ICSID conciliation/arbitration clauses would be well advised to resolve the basic characterization of the transaction involved in their agreement. As stated above, this issue is not germane to the present discussion, but, in the ICSID context, it ought to be given proper attention.⁷⁷

Choice-of-Forum / Arbitration Clauses

The complexity of domestic immunity rules is such that it is a direct invitation to forum shopping. This remark is nicely illustrated by the efforts of the Libyan American Oil Co. to enforce the *LIAMCO* award⁷⁸ against Libya in France, the United States, Switzerland and Sweden.

In France, the award was recognized, but attachments of Libyan assets in France were vacated for reasons of immunity from execution.⁷⁹ In the United States, it was held that by consenting to arbitration, Libya had waived its immunity and that the court had jurisdiction to give recognition to the award. However, the court refused to exercise jurisdiction on the basis of the act of state doctrine.⁸⁰ In Switzerland, the Federal Tribunal, consistent with Swiss precedents,⁸¹ declined to exercise jurisdiction on the ground that the sole contact between the transaction and Switzerland was that the seat of arbitration was located in Geneva, which was deemed insufficient to found jurisdiction.⁸² Finally, in Sweden, the Court of Appeal

as bauxite mining (*Alcoa / Kaiser / Reynolds v. Jamaica*), oil exploitation and exploration (*AGIP v. Congo*, *Tesoro v. Trinidad and Tobago*), and forestry exploitation (*LETCO v. Liberia*); (2) industrial investments regarding the production of fibers for exports (*Gardella v. Ivory Coast*), the manufacture of plastic bottles for domestic consumption (*Eenvvenuti & Bonfant v. Congo*), liquefaction of natural gas (*Guadalupe v. Nigeria*), and the production of aluminum (*Alusuisse v. Iceland*); (3) tourism development in the form of the construction of hotels (*Holiday Inns v. Morocco*; *AMCO Asia v. Indonesia*); and (4) urban development in the form of housing construction (*SOABI v. Senegal*).

Disputes relating to modern types of investment include those concerning the construction of a chemical plant on a turnkey basis, coupled with a management contract providing technical assistance for the operation of the plant (*Klöckner v. Cameroun*); a management contract for the conversion of vessels into fishing vessels and the training of crews (*Atlantic Triton v. Guinea*); and technical and licensing agreements for the manufacture of weapons (*Colt Industries v. Korea*). In the same category, one might also mention a dispute, which is the only one brought by a state against an investor, relating to the breach of a contract for the construction of a maternity ward (*Gabon v. Serete*).

⁷⁷ See ICSID Model Clauses, sec. 2, para. 7. Delaume, *ICSID Clauses: Some Drafting Problems*, NEWS FROM ICSID, Summer 1984, No. 2, at 18-19.

⁷⁸ See note 5 *supra*.

⁷⁹ *Procureur de la République v. Société LIAMCO*, Judgment of Mar. 5, 1979, Trib. gr. inst., Paris, 106 JDI 857 (1979). See also note 24 *supra*.

⁸⁰ *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F.Supp. 1175 (D.D.C. 1980), vacated, 684 F.2d 1032 (D.C. Cir. 1981). See also the U.S. Government's brief in 20 ILM 161 (1981).

⁸¹ See cases cited in notes 68 and 69 *supra*.

⁸² *Socialist Libyan Arab Popular Jamahiriya v. Libyan American Oil Co.*, Judgment of June 19, 1980, Bundesgericht, 20 ILM 151 (1981).

of Stockholm held that, by consenting to arbitration, Libya had waived its immunity from suit and execution.⁸³

To avoid such a proliferation of proceedings, both private and public parties to economic development relationships may find it to their interest to specify at the outset which forum will have jurisdiction over disputes between them. Depending on the parties' preference, the selected forum may be a judicial or an arbitral tribunal.

The Judicial Route. By submitting to the jurisdiction of a specific court, the parties may seek to accomplish a dual objective. First, they may attempt to eliminate much of the uncertainty attendant upon rules of transnational jurisdiction. Second, by bringing disputes within the jurisdiction of a specified forum, the parties may impart a significant degree of predictability into their relationship as regards the immunity rules of the chosen forum.

In the absence of a specific statute on the subject, transnational jurisdictional rules applicable to economic development litigation are essentially those that are found in domestic law. A state may therefore be exposed to litigation in unexpected forums such as are stipulated by exorbitant rules of jurisdiction based on the nationality of the plaintiff,⁸⁴ the plaintiff's domicile⁸⁵ or the presence of assets within the forum.⁸⁶ A contractual choice of forum may remedy the situation, since this type of stipulation is generally given effect in the countries where such jurisdictional rules are found.⁸⁷

Choosing a particular forum may also indicate the probable outcome of litigation under the immunity rules obtaining at that forum. So long as the parties agree to confer exclusive jurisdiction on a single forum and expect local judgments to be satisfied through the remedies available at the chosen forum, their investigation of immunity rules may be limited to those prevailing in a single jurisdiction. In these circumstances, choice-of-forum clauses should provide effective "immunity avoidance" or, at least, enable the parties to ascertain the precise reach of sovereign immunity rules.⁸⁸ However, if the need arises to enforce the selected forum's

⁸³ *Libyan American Oil Co. v. Socialist People's Arab Republic of Libya*, Judgment of June 18, 1980, Svea Court of Appeal (Stockholm), 20 ILM 893 (1981). Appeal was taken to the Swedish Supreme Court, but the dispute was settled before the Court could hear the case.

⁸⁴ CODE CIVIL, Art. 14 (Fr.). See *Société Nationale des Transports Routiers v. Compagnie Algérienne de Transports et d'Affrètement*, Judgment of Mar. 23, 1977, Cour d'appel, Paris (unpub.), summarized in G. DELAUME, note 1 *supra*, ch. VIII, para. 8.02, *aff'd*, Judgment of Mar. 19, 1979, Cass. civ. com., summarized in 1980 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 858.

⁸⁵ Dutch Code of Civil Procedure, Art. 126(3). For the *N.V. Cabolent* case, see note 17 *supra*.

⁸⁶ German Code of Civil Procedure, Art. 23. See *Nonresident Petitioner v. Central Bank of Nigeria*, Judgment of Dec. 2, 1975, District Court, Frankfurt, 16 ILM 501 (1977).

⁸⁷ G. DELAUME, note 1 *supra*, ch. VIII, paras. 8.07-8.10.

⁸⁸ This remark must be limited to "exclusive," as opposed to "alternative," choices of forum. In the event that the parties, or one of them, elect to provide for the jurisdiction of

judgment in another country or countries, the parties may have to contend anew with both transnational jurisdictional rules and immunity rules.

The private claimant may seek to take advantage of those immunity rules that most favor the prosecution of its claim by engaging in forum shopping. Jurisdictional considerations, however, may interfere with immunity-oriented forum shopping. Among other possible considerations, the private claimant may be faced with various issues concerning the recognition and enforcement of foreign judgments, including those regarding proof of the "final" character of the judgment sought to be enforced, the existence of reciprocity and matters of public policy.

All that can be said in this respect is that these issues do not arise with the same intensity in all cases. Creditors of judgments rendered in European countries find themselves in a much more favorable position than they would if the judgments had been rendered in the United States. European countries are parties to an extensive network of bilateral and multilateral treaties providing for the reciprocal recognition and enforcement of judgments,⁸⁹ whereas the United States has not concluded any treaty on the subject.⁹⁰ The recognition and enforcement of American judgments in other countries is therefore subject to foreign municipal rules which, on the whole, are less liberal than U.S. rules on foreign judgments.⁹¹

Such obstacles do not present themselves when arbitration is chosen as the means of settlement since the United States, like many other countries, is a party to international agreements facilitating the recognition and enforcement of arbitral awards.⁹² Potential judgment/award creditors in the United States might be well advised to take account of these considerations.

a particular forum, but give themselves the option of bringing action in other forums (as most transnational lenders do), the certainty sought to be achieved in regard to immunity rules by the choice of an exclusive forum would naturally disappear.

⁸⁹ G. DELAUME, note 1 *supra*, ch. X.

⁹⁰ A draft U.S.-UK treaty on the subject has remained a draft and is unlikely to become a reality. *See id.*, ch. IX, para. 9.14.

⁹¹ *Id.*, chs. IX and X. Note also that section 31 of the Civil Jurisdiction and Judgments Act 1982, ch. 27, provides specifically that a foreign judgment against a state may be recognized and enforced in the United Kingdom only if:

- (a) it would be so recognized and enforced if it had not been given against a State; and
- (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978.

The Act is reprinted in *id.*, App. I, Booklet C, at 19 (1984) and in 22 ILM 123 (1983).

⁹² These agreements include the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3, 21 UST 2517, TIAS No. 6997, and the ICSID Convention, *supra* note 7. The United States has not yet ratified the Inter-American Convention on International Commercial Arbitration of 1975, 14 ILM 336 (1975), which is in force among several Latin American countries.

The Arbitral Route. Recourse to arbitration to settle disputes arising out of economic development relationships is not equally effective in all cases. In this connection, a basic distinction must be made between ICSID and non-ICSID arbitration.

It is generally agreed that submission to arbitration constitutes an implicit waiver of immunity from suit.⁹³ Yet the fact remains that in non-ICSID arbitration, if a state challenges this rule, a private claimant may be exposed to the expense and delays of litigation so as to establish the binding character of the state's consent to arbitration.⁹⁴ Furthermore, issues of immunity may recur at the time of recognition and enforcement of an award against a state, since the state may argue that recognition is a preliminary to execution and raise a plea of immunity in that connection.⁹⁵

The ICSID Convention resolves these problems. Under the Convention, consent to ICSID arbitration, once it is given, cannot be unilaterally revoked. Consent by a state to this method of settling investment disputes therefore constitutes an irrevocable waiver of immunity from suit.⁹⁶

Immunity from suit is also eliminated at the time of recognition of an ICSID award. The Convention provides that each contracting state is obliged to recognize an ICSID award and to enforce the pecuniary obligations imposed by it as if the award were a final judgment of a court in that recognizing state.⁹⁷ The procedure for recognition is both simple and expedient since any creditor may redeem its award by furnishing a certified copy to the recognizing court or other authority.⁹⁸

ICSID arbitration, therefore, offers considerable advantages over other forms of arbitration. Nevertheless, in selecting possible options, the draftsman must remember that ICSID arbitration is available only for investment disputes and that concept does not necessarily cover all the disputes that may stem from the economic development activities of states.⁹⁹ Furthermore, the ICSID Convention does not purport to amend the rules of immunity from execution that obtain in contracting states.¹⁰⁰ Although the issue of immunity from execution is of limited application in the system of the Convention,¹⁰¹ and no such issue has arisen,¹⁰² it is nevertheless a remote possibility that the careful draftsman cannot ignore.

⁹³ Delaume, *State Contracts and Transnational Arbitration*, 75 AJIL 784, 786-88 (1981).

⁹⁴ *Id.* at 788-90.

⁹⁵ *Id.* at 815-16.

⁹⁶ Delaume, note 51 *supra*, at 791.

⁹⁷ Convention, *supra* note 7, Art. 54(1).

⁹⁸ *Id.*, Art. 54(2). For a concrete example, see S.A.R.L. Benvenuti [should read Benvenuti] & Bonfant v. Gouvernement de la République du Congo, Judgment of June 26, 1981, Cour d'appel, Paris, 108 JDI 843 (1981), and (in English translation) 20 ILM 878 (1981).

⁹⁹ See notes 76 and 77 *supra*.

¹⁰⁰ Convention, *supra* note 7, Art. 55.

¹⁰¹ Issues of immunity should be viewed in the context of the Convention as a whole. Thus, a contracting state that is party to an ICSID award has the obligation to comply with the award (Convention, Art. 53(1)), and if that state has revoked its immunity to thwart enforcement of an award, it will be exposed to various sanctions, which are expressly provided for in the Convention (Arts. 27(1) and 64). See G. DELAUME, note 1 *supra*, ch. XV, para. 15.29.

¹⁰² Most disputes submitted to ICSID have been amicably settled or discontinued. At the time of writing, four awards on the merits have been rendered. Only the *Benvenuti v. Congo*

Aside from these legal considerations, the draftsman's choice may be influenced by other factors. In consenting to submit disputes to arbitration, whether under ICSID or under some other system, private parties rely to a large extent on the good faith of the state involved and of its expected willingness to comply with the terms of an award. Although compliance may take some time and result in negotiated settlements,¹⁰³ arbitration is usually an effective method of adjudication.

Waiver of Immunity

The ultimate technique of "immunity avoidance" is to provide express waivers of immunity in the relevant contractual documents. The extent to which such waivers are found in economic development agreements varies significantly from case to case.

Waivers of immunity are commonplace in transnational loan documents. Lenders almost never fail to see that borrowing states or other public entities waive both immunity from suit and immunity from execution, whether before or after recovery of judgment.¹⁰⁴ So long as the relevant provision is clearly worded and does not lend itself to restrictive interpretation,¹⁰⁵ or as other considerations, such as those based on the act of state doctrine,¹⁰⁶ do not interfere with the lenders' expectations, there is reason to have confidence in the merits of such waivers.

Outside the financial field, waivers of immunity are relatively rare. However, examples can be found in certain economic development agreements, particularly those providing for ICSID arbitration.¹⁰⁷

award (see note 98 *supra*) has been the object of recognition proceedings. These were followed by Congo's compliance with the award. See NEWS FROM ICSID, Winter 1984, No. 1, at 2.

¹⁰³ Such was the case in regard to the BP, TOPCO and LIAMCO awards. See von Mehren & Kourides, note 5 *supra*; and Lalive, note 5 *supra*.

¹⁰⁴ For illustrations, see G. DELAUME, note 1 *supra*, chs. XI, para. 11.06-11.07 and XII, para. 12.05.

¹⁰⁵ See, e.g., *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 (2d Cir. 1982). But see *Banque Compařina v. Banco de Guatemala*, 583 F.Supp. 320 (S.D.N.Y. 1984). Compare *Sperry Int'l Trade Inc. v. Government of Israel*, 532 F.Supp. 901 (S.D.N.Y. 1982), *aff'd*, 670 F.2d 8 (2d Cir. 1982), 20 ILM 1066 (1982).

¹⁰⁶ See, e.g., *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 566 F.Supp. 1440 (S.D.N.Y. 1983).

¹⁰⁷ See, e.g., the Exploration Agreement of Apr. 14, 1983, between Liberia and Amoco Liberia Exploration Co. (PETROLEUM LEGIS., SOUTH AND CENTRAL AFRICA, Supp. No. 76), Art. XXI(H):

The Republic of Liberia hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a tribunal constituted pursuant to this Contract, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of such of its property as is of a commercial nature from execution.

For other illustrations, see G. DELAUME, note 1 *supra*, ch. XV, para. 15.29. See also ICSID Model Clauses, clauses XVI and XIX, Doc. ICSID/5/Rev.1 (July 7, 1981).

CONCLUSION

This initial investigation into issues of immunity prompted by economic development activities leads to several conclusions.

First, techniques of immunity avoidance, when they are available, which is not always the case,¹⁰⁸ are not used as much as they might be in order to anticipate the consequences of immunity rules. Consistently favored by transnational lenders,¹⁰⁹ these techniques are only sporadically resorted to for other types of state contracts relating to economic development.¹¹⁰ There are many cases in which the parties made no attempt to resolve immunity issues through contractual stipulations.¹¹¹ The foregoing analysis therefore suggests that perhaps the time has come to reconsider the merits of immunity avoidance. It is only fair to note, however, that strictly legal considerations are not the only ones that have to be taken into account in negotiating economic development agreements with states. Considerations of prestige, as well as of good will and mutual trust, are equally important to the conclusion of these agreements and to their successful implementation. Plainly, immunity avoidance cannot be carried to the point of ignoring these, and possibly other, considerations that are of vital interest to the parties.

A second conclusion is that, on the whole, courts in Europe and in the United States agree on the basic issue of characterization. On both shores of the Atlantic, the general view prevails that economic development agreements, regardless of their "purpose," are to be considered by "nature" as commercial activities. About the only discordant note was that struck by American decisions regarding the exploitation of natural resources.¹¹² As noted above, these decisions are not necessarily persuasive,¹¹³ and one hopes that, when American courts are fully aware of the lessons of comparative analysis of immunity law, they may reconsider their original position.

Finally, the commonality of legal thinking, which is apparent from the cases that were discussed, is encouraging. Yet its sphere of application remains geographically confined. In the continuing dialogue between North and South, the solutions that were noted here are particular to Western countries of the North. They have no counterpart in socialist countries, such as the USSR or China,¹¹⁴ which, for reasons of their own,

¹⁰⁸ For example, in regard to torts (see the *SEDCO* case, note 34 *supra*; the *Harris* case, note 40 *supra*), antitrust (see the *International Ass'n of Machinists* case, note 26 *supra*), employment discrimination (see the *Rios* case, note 32 *supra*), and nationalization (see the *Corporacion del Cobre* case, note 23 *supra*). See also Kahale, *Characterizing Nationalization for the Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine*, 6 *FORDHAM INT'L L.J.* 391 (1983).

¹⁰⁹ See notes 75 and 104-106 *supra*.

¹¹⁰ See notes 76-77 and 107 *supra*.

¹¹¹ See cases cited in notes 17, 19, 39, 45, 50, 52 and 73 *supra*.

¹¹² See notes 26-38 *supra*.

¹¹³ *Id.*

¹¹⁴ See, e.g., Osakwe, *A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice*, 23 *VA. J. INT'L L.* 13 (1982); People's Republic of China, *Aide Mémoire of the Ministry of*

remain faithful to the doctrine of absolute immunity. Under the circumstances, the likelihood of harmonizing immunity rules on a global basis, at least as regards economic development, appears doubtful for some time to come.¹¹⁵

Foreign Affairs, Feb. 3, 1983, reprinted in 22 ILM 81 (1983); Sgro, *China's Stance on Sovereign Immunity: A Critical Perspective of Jackson v. People's Republic of China*, 22 COLUM. J. TRANSNAT'L L. 101 (1983).

¹¹⁵ McCaffrey, *The Thirty-fifth Session of the International Law Commission*, 78 AJIL 457 (1984). See also Draft Articles for a Convention on State Immunity, prepared by the International Law Association, 22 ILM 287 (1983); and the Inter-American Draft Convention on Jurisdictional Immunity of States, prepared by the Organization of American States, 22 ILM 292 (1983).

MARINE POLLUTION UNDER THE LAW OF THE SEA CONVENTION

By Alan E. Boyle*

I. INTRODUCTION

It is now 30 years since the conclusion of the International Convention for the Prevention of Pollution of the Sea by Oil¹ marked the international community's first serious attempt to cope with the increasing scale of marine pollution.² Since then, pollution of the seas by oil, chemicals, nuclear waste and the effluent of urban industrial society has continued to grow and to cause ever more serious damage to the living resources and ecology of the marine environment and to the shores of coastal states.³ The control, reduction and elimination of marine pollution has become one of the major issues in the contemporary law of the sea and it has proved to be a complex task, requiring the creation of a new and growing body of international law. This process, though in certain respects still incomplete, has reached its potentially most significant stage of codification and development through the provisions of the Law of the Sea Convention of 1982.

Protection of the marine environment had not been given much attention at the Geneva Conference on the Law of the Sea in 1958 and the Geneva Conventions had little to say on the subject. States were required by Articles 24 and 25 of the Convention on the High Seas to regulate oil pollution from ships, pipelines and seabed operations, to prevent nuclear pollution and to cooperate with international organizations in preventing pollution; but these obligations fell a long way short of constituting a general duty to control and regulate all sources of marine pollution or to protect the marine environment, and their content was uncertainly defined, leaving states much discretion in their application. In practice, states enjoyed a substantial measure of freedom to pollute the

* Lecturer, Faculty of Laws, Queen Mary College, University of London. This is a revised text of a paper delivered at a conference on the United Nations Law of the Sea Convention held in London in January 1984.

¹ Done at London, May 12, 1954, 12 UST 2989, TIAS No. 4900, 327 UNTS 3.

² A draft convention was drawn up at an international conference held in Washington in June 1926, but it was not opened for signature. A further attempt to convene an international conference in 1935 was not successful. See R. M'GONIGLE & M. ZACHER, *POLLUTION, POLITICS AND INTERNATIONAL LAW* 81-83 (1979).

³ For surveys of the problem and of the literature, see in particular Schachter & Serwer, *Marine Pollution Problems and Remedies*, 65 AJIL 84 (1971); R. M'GONIGLE & M. ZACHER, *supra* note 2; D. ABECASSIS, *OIL POLLUTION FROM SHIPS* (1978); *THE IMPACT OF MARINE POLLUTION* (D. Cusine & J. Grant eds. 1980); Petaccio, *Water Pollution and the Future Law of the Sea*, 21 INT'L & COMP. L.Q. 15 (1972).

oceans, and the existing law did not provide for the full range of forms and sources of marine pollution.

By 1973, when the Third United Nations Conference on the Law of the Sea began work, general multilateral conventions had been concluded to regulate vessel-source pollution,⁴ dumping at sea,⁵ intervention in cases of maritime casualties⁶ and civil liability for vessel-source pollution.⁷ These did much to refine and develop the sketchy provisions of the Convention on the High Seas, but states were not obliged to adopt them, and their record of ratification and enforcement left much to be desired.⁸ Other important problems remained substantially unregulated. There were no internationally agreed rules for the control of land-based sources of marine pollution or for airborne pollution. The prevention of pollution from operations on the deep seabed had not yet been addressed and the special problems of straits and arctic waters were still unresolved. Essentially, the deficiencies of the existing legal regime stemmed from the lack of a generally accepted framework or structure of legal principles capable of dealing with the full range of marine pollution problems and defining comprehensively and with greater particularity the powers and duties of states in all matters of marine environmental protection.

Those general principles which did exist were increasingly seen to be unsatisfactory and ineffective in their operation. The traditional principle of exclusive flag state jurisdiction over vessels beyond the territorial sea had not succeeded in eliminating vessel-source pollution or in protecting coastal states from the threat to their environment posed by the rapid increase in the transport of oil and other noxious substances by sea.⁹ Coastal states could respond to this problem by claiming greater jurisdiction over pollution beyond their territorial sea, but this solution, a deeply controversial inroad on the freedom of navigation, was resisted by many.¹⁰

⁴ The International Convention for the Prevention of Pollution of the Sea by Oil, *supra* note 1, as amended in 1962, 17 UST 1523, TIAS No. 6109, 600 UNTS 332, in 1969, 28 UST 1205, TIAS No. 8505, and in 1971, 2 NEW DIRECTIONS IN THE LAW OF THE SEA 589 (Lay, Churchill & Nordquist eds. 1973) [hereinafter cited as NEW DIRECTIONS]; the International Convention for the Prevention of Pollution from Ships, *done* at London Nov. 2, 1973, *reprinted in* 12 ILM 1319 (1973), with protocol, *done* at London Feb. 17, 1978, 17 ILM 546 (1978) [hereinafter cited as MARPOL Convention].

⁵ The International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *done* at London Dec. 29, 1972, 26 UST 2403, TIAS No. 8165 [hereinafter cited as Dumping Convention].

⁶ The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, Nov. 29, 1969, 26 UST 765, TIAS No. 8068, with protocol, London 1973, 4 NEW DIRECTIONS, *supra* note 4, at 451 (Churchill & Nordquist eds. 1975).

⁷ The International Convention on Civil Liability for Oil Pollution Damage, Brussels, Nov. 29, 1969, *reprinted in* 64 AJIL 481 (1970), with protocol, London, Nov. 19, 1975, *reprinted in* 16 ILM 617 (1977).

⁸ See sections II and III *infra*.

⁹ See generally R. M'GONIGLE & M. ZACHER, *supra* note 2, ch. 4.

¹⁰ See especially the Canadian Arctic Waters Pollution Act 1970, and the U.S. note of objection, 1 NEW DIRECTIONS, *supra* note 4, at 199 and 211 (Lay, Churchill & Nordquist eds. 1973).

In the absence of widespread recognition of such claims, only the law of state responsibility afforded some general protection and rights of redress for states affected by pollution emanating from sources outside their jurisdiction. But here, uncertainty and doubt over the applicable principles were highlighted by the *Torrey Canyon* disaster, which quickly prompted the adoption of the 1969 Conventions on intervention on the high seas and civil liability. These were useful clarifications of the rights of states to take preventive action or seek compensation from national courts when threatened or affected by oil pollution from vessels, but even when extended to other forms of vessel-source pollution, they still dealt only with a relatively limited and specific problem. Wider principles of state responsibility for damage to the marine environment or to other states continued to rest on inference from a handful of arbitral and judicial decisions concerned only incidentally with marine pollution and formulated at a high level of generality.¹¹

Recognition of the inadequacies of the existing law and of the need for a more comprehensive approach to protecting the marine environment from all forms and sources of pollution was evident in the marine pollution recommendations of the United Nations Conference on the Human Environment, held at Stockholm in 1972.¹² The recommendations called on states to accept and implement existing instruments on the control of marine pollution, to ensure the effectiveness of controls on vessel-source pollution and dumping at sea and to participate in new efforts to bring all sources of marine pollution, including land-based sources, under appropriate controls.¹³ The need for special measures to protect enclosed and semi-enclosed seas and to promote research and monitoring by national and international agencies was also accepted.¹⁴

At the regional level, these recommendations have inspired a series of agreements negotiated under the auspices of the UN Environment Programme (UNEP),¹⁵ but it is the Law of the Sea Convention that represents perhaps the most concrete and extensive manifestation of the desire of

¹¹ See section IV *infra*.

¹² Declaration on the Human Environment and Marine Pollution Recommendations, 2 NEW DIRECTIONS, *supra* note 4, at 712 and 718.

¹³ *Id.*, Recommendations 86 and 92.

¹⁴ *Id.*, Recommendations 87-91.

¹⁵ The Convention for the Protection of the Mediterranean Sea against Pollution, *done* at Barcelona Feb. 16, 1976, *reprinted* in 15 ILM 290 (1976), with protocols, Athens 1980, 19 ILM 869 (1980), and Geneva 1982; the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, Kuwait, Apr. 24, 1978, 17 ILM 511 (1978); the Convention for the Conservation of the Red Sea and Gulf of Aden Environment, Jeddah 1982, *reprinted* in NEW DIRECTIONS (Simmonds loose-leaf ed. 1983), Doc. J.19; the Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, Lima 1981, *id.*, Doc. J.18; the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean, Cartagena 1982, *id.*, Doc. J.17; the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan 1981, *id.*, Doc. J.4.

The Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, Mar. 22, 1974, *reprinted* in 13 ILM 546 (1974), is not a UNEP agreement but is

states to realize the principles and recommendations of the Stockholm Conference and to bring about more effective control of marine pollution. The articles on the protection and preservation of the marine environment that finally emerged as part XII of the Convention represent the first attempt to set out a general framework for a legal regime that establishes on a global, conventional basis the obligations, responsibilities and powers of states in all matters of marine environmental protection. Save for those articles dealing with the deep seabed and the settlement of disputes, no other part of the Convention differs so radically from the Geneva Conventions of 1958 or more fully exemplifies an altered sense of priorities. The articles on this subject are thus of the greatest general significance.

Building on the codification and development of the existing structure of customary law and general and regional conventions relating to pollution,¹⁶ the marine pollution regime is both general, in its application throughout the marine environment, and comprehensive, in including all forms and sources of marine pollution. Articles 192 and 194 place on states a basic duty to protect and preserve the marine environment and an obligation to take all measures necessary to prevent, reduce and control marine pollution and to ensure that activities under their jurisdiction or control do not cause pollution damage to other states or otherwise spread beyond the seas where they exercise sovereign rights. These articles do more than establish the primary duty of states in marine environmental matters; they provide the foundation for a much more complex and wide-ranging structure of powers and duties covering the control of pollution, the adoption and enforcement of laws and regulations, global and regional cooperation and assistance, monitoring and environmental assessment, notification and intervention, and state responsibility.

This structure, and it is only a general framework of powers and duties, not a code of specific standards for particular forms of pollution, reflects a fundamental shift from power to duty as the central controlling principle of the legal regime for the protection of the marine environment. Whereas previously states were to a large degree free to determine for themselves whether and to what extent to control and regulate marine pollution, they will now in most cases be bound to do so on terms laid down by the Convention.¹⁷ For the first time, they are obliged to cooperate globally and regionally in controlling pollution,¹⁸ formulating rules and standards,¹⁹

similar in form to subsequent agreements. See generally Boyle, *Regional Pollution Agreements and the Law of the Sea Convention*, in *THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: AN ANGLO-SOVIET POST-UNCLOS ASSESSMENT* (W. E. Butler ed. 1985).

¹⁶ See Schneider, *Codification and Progressive Development of International Environmental Law at the Third United Nations Conference on the Law of the Sea: The Environmental Aspects of the Treaty Review*, 20 COLUM. J. TRANSNAT'L L. 243 (1981).

¹⁷ Arts. 194-196, 207-212, United Nations Convention on the Law of the Sea, Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), reprinted in 21 ILM 1261 (1982) [hereinafter cited as Convention].

¹⁸ *Id.*, Art. 199. See generally Kiss, *Co-operation for the Control of Accidental Marine Pollution*, 23 GERMAN Y.B. INT'L L. 231 (1980); and Boyle, *supra* note 15.

¹⁹ Convention, Art. 197.

giving notification of imminent or actual damage²⁰ and undertaking research and the exchange of information.²¹ Again for the first time, there are obligations to provide technical and scientific assistance, especially to developing states,²² and to conduct monitoring and environmental assessments.²³ These obligations serve also to define and elaborate the customary obligation of responsibility for causing environmental damage, which is now placed on a conventional basis.²⁴ Against this background, it is no longer a power to control, still less a freedom to pollute, that characterizes the legal regime of the marine environment, but a new framework based on obligations of control, regulation, enforcement, cooperation and responsibility.

This article will seek to examine three elements of this new legal regime: the distribution, content and control of prescriptive jurisdiction; the attribution of competence to enforce applicable standards; and the allocation of risk through principles of state responsibility and related concepts of liability, notification and intervention. Although these are not the only issues addressed by part XII of the Convention, they are central to the development of the new concept of a duty to protect and preserve the marine environment and to any attempt to evaluate the adequacy and completeness of the Convention's approach to marine pollution.

II. PRESCRIPTIVE JURISDICTION AND STANDARD SETTING

Traditional international law did not in general impose duties on states to regulate pollution at sea; it merely empowered them to do so. Although Article 24 of the High Seas Convention did require states to regulate oil pollution from ships, pipelines and seabed operations, it did not specify the content or standard of those regulations beyond requiring that existing treaty provisions should be taken into account. This left a very substantial measure of discretion to individual states even in those cases covered by Article 24, and it did not oblige them to ratify or adopt relevant international conventions such as the 1954 and 1973 Conventions on vessel-source pollution. Some important flag states were not parties to these and adopted their own national regulations of a rather lower standard, while others, though accepting international standards, were lax in inspecting, prosecuting violations or following up reports from coastal states.²⁵ Nor, for the most part, were there any international standards

²⁰ *Id.*, Art. 198.

²¹ *Id.*, Art. 200.

²² *Id.*, Arts. 202-203.

²³ *Id.*, Arts. 204-206. UNEP has several such schemes in operation, notably GEMS and GESAMP. See UN Doc. A/CONF.62/C.3/L.23 (1975), 4 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 207 [hereinafter cited as OFFICIAL RECORDS]; and V. PRAVIDIC, GESAMP (UNEP 1981).

²⁴ Convention, Art. 235. See section IV *infra*.

²⁵ See generally R. M'GONIGLE & M. ZACHER, *supra* note 2, chs. 4 and 6; Gold & Johnston, *Ship Generated Pollution*, in LAW OF THE SEA: PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE (13th Conference) 157 (1979); and see also the statement of the UK delegate in 4 OFFICIAL RECORDS, *supra* note 23, at 82.

regulating pollution from pipelines and seabed operations, although rigs and platforms were generally treated as ships for the purposes of conventions on vessel pollution and dumping.²⁶ Regulation of other sources of pollution, such as dumping or land-based pollution, was simply not covered by the Geneva Conventions. The net result was to leave states largely free to adopt their own regulations on marine pollution, subject only to the few limitations imposed by international law, and the application of internationally accepted standards was in effect permissive rather than obligatory.

These deficiencies could not be made good by coastal states alone, which had power to prescribe rules for the operation of ships only within the territorial sea and for seabed operations on the continental shelf. Beyond those limited zones of authority, the flag state or state of nationality retained sole jurisdiction and the narrow concept of the contiguous zone did not materially alter this position in respect of pollution.²⁷ A dominant theme of the Law of the Sea Conference was the failure of this traditional structure of prescriptive jurisdiction to protect the interests of coastal states. On the one hand, the power of the coastal state to regulate shipping and activities off its coast was too limited; on the other, the duty of the flag state to adopt and enforce appropriate regulations was too imperfectly defined and observed. But more important was the realization that it could not be conducive to the protection and preservation of the marine environment to continue with a legal regime based on the assumption that regulation of all sources of pollution was largely permissive. It left too much discretion to individual states to decide whether and how to control pollution.

The approach of the Convention to these problems is threefold. It attempts firstly to create a general duty to regulate all sources of marine pollution. Secondly, there is a redistribution and redefinition of the balance of prescriptive powers and duties between coastal and flag states, to some extent enhancing the power of the former at the expense of the latter's traditional primacy in the regulation of shipping. Finally, the Convention not only determines who may or should regulate pollution; it tries for the first time to control the content and standard of those regulations through a preference, in most cases, for internationally agreed rules. This approach serves a limiting function in two alternative senses. When specifying international rules as a maximum standard of regulation, it seeks to prevent abuse and the imposition of excessively onerous burdens on

²⁶ MARPOL Convention, *supra* note 4, Art. 2(4), Ann. 1, Reg. 21; Dumping Convention, *supra* note 5, Art. III(1)(a). Some regional conventions now subject seabed installations to control as land-based sources of pollution: see the Convention for the Prevention of Marine Pollution from Land-based Sources, done at Paris Feb. 21, 1974, Art. 3(C)(iii), reprinted in 13 ILM 352 (1974); the Baltic Sea Convention of 1974, *supra* note 15, Art. 2(2); and the Athens Protocol of 1980 to the Mediterranean Sea Convention, *supra* note 15, Art. 4(2). It is not clear how far these can be treated as "international" standards.

²⁷ Art. 24, Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205. Pollution control would be included only insofar as it fell under the heading of "sanitary regulations."

foreign vessels; when specifying them as a minimum standard, it gives content and effectiveness to the state's duty to regulate. A measure of uniformity is thus also achieved.

As with other parts of the Convention, these provisions on prescriptive jurisdiction are best seen as part of a system for reconciling the conflicts of interest that dominate the law of the sea, through a process of sharing and controlling power.²⁸ Its combination of legislative powers and duties with a mechanism for controlling and fettering their exercise endows the Convention with some of the characteristic features of a system of administrative law.²⁹ The resulting structure is undeniably more complex than hitherto, and to understand it fully it is necessary to look in more detail at the duty of regulation and the jurisdictional competence of coastal states.

A Duty to Regulate Pollution

The obligations contained in Articles 207–212 to adopt laws and regulations and to establish international, global and regional rules and standards form part of the primary obligation established by Articles 192 and 194 to protect and preserve the marine environment and to take all necessary measures to prevent, reduce and control pollution. These regulatory obligations apply to all sources of pollution covered by the Convention,³⁰ except that for vessel-source pollution only the flag state has the duty to adopt laws and regulations;³¹ coastal states are merely empowered, but not bound, to do so, and then only in areas within their jurisdiction and within limits defined by the Convention.³² In all cases, the duty is to adopt laws and regulations to prevent, reduce and control pollution from the source in question,³³ but there are important differences of form. The Convention does not specify precisely the content and extent of the laws and regulations to be adopted in each case, but proceeds indirectly through rules of reference.

In their strongest form, these references indicate a minimum standard for legislation. Thus, flag state regulation of vessel pollution must “at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference”;³⁴ seabed operations laws must be “no less effective than international rules, standards and recommended practices and procedures”;³⁵ and dumping regulations must be “no less effective . . . than the global rules and standards.”³⁶ There remains a measure of discretion in each case; the state is free to set higher standards should it choose to do so, but international or global rules provide the starting

²⁸ See Allott, *Power Sharing in the Law of the Sea*, 77 AJIL 1 (1983).

²⁹ *Id.* at 10–11.

³⁰ Convention, Arts. 207–212.

³¹ *Id.*, Art. 211(2).

³² *Id.*, Art. 211(4) and (5). See section III *infra*.

³³ Convention, Arts. 207(1), 208(1), 210(1), 211(2), 212(1).

³⁴ *Id.*, Art. 211(2).

³⁵ *Id.*, Art. 208(3).

³⁶ *Id.*, Art. 210(6).



point for at least what it must do. As an essential corollary, the Convention also envisages a duty to establish such international rules.³⁷ Arguably, they already exist in the form of the London Convention on dumping of 1972 and the 1954 and 1973 Conventions on pollution from ships.³⁸

In contrast, the role of the rules of reference for atmospheric and land-based pollution is very much weaker. Here the obligation is only to "take account of" internationally agreed rules and standards, but not necessarily to adopt them.³⁹ The result is similar to that of Article 24 of the High Seas Convention. It leaves states very wide discretion to adopt their own laws and is in effect a power to set national standards uncontrolled by any internationally agreed criteria.⁴⁰ States are also not obliged to establish international rules for these sources of pollution, as they are for vessel and seabed pollution; they need only "endeavour" to do so.⁴¹ In consequence of these provisions, Articles 207 and 212 are largely hortatory; they relegate obedience to the duty to regulate land-based and atmospheric pollution to the good faith of individual states.

The Convention therefore does not maintain a single, uniform approach to the regulation of all sources of pollution. Land-based and atmospheric pollution is clearly subjected to a negligible level of international control and such regulations as are adopted need not conform to any particular pattern, whether of minimum standards or otherwise. This difference of approach resulted in part from pressure from developing countries for recognition of their special needs: a claim for a double standard that was a matter of some controversy at the conference,⁴² as it had been at earlier conferences on aspects of pollution control.⁴³ But many developed states shared a particular reluctance on economic grounds to impose uniform international standards for these two sources of pollution, and there is no doubt that regional solutions to these problems seemed to many states to offer a more acceptable compromise.⁴⁴ This attitude is reflected strongly

³⁷*Id.*, Arts. 208(5), 211(1). Curiously, Article 210(4) on dumping only requires states to "endeavour" to establish global and regional rules. On the significance of this phrase, see below.

³⁸ See below for further consideration of this point.

³⁹ Convention, Arts. 207(1) and 212(1).

⁴⁰ Article 207(5) does specify, however, that regulations on land-based pollution should cover the release of "toxic, harmful or noxious substances."

⁴¹ Convention, Arts. 207(4) and 212(3).

⁴² See REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 47-51, 74 and 89 (M. Nordquist & C. Park eds. 1983) [hereinafter cited as U.S. DELEGATION REPORTS]. The main discussion of these issues was at Caracas in 1974, Geneva in 1975 and the UN Sea-bed Committee in 1973. See also Article 194(1) of the Convention, which requires states to protect the marine environment by using the best practicable means "in accordance with their capabilities"; this allows a flexible standard according to the capabilities of less-developed states. See also note 46 *infra*.

⁴³ Notably, the Stockholm Conference on the Human Environment.

⁴⁴ See references in note 42 *supra*; see generally Kindt, *The Effect of Claims by Developing Countries on the Law of the Sea International Marine Pollution Negotiations*, 20 VA. J. INT'L L. 313 (1979); C. OKIDI, REGIONAL CONTROL OF OCEAN POLLUTION (1978).

in state practice⁴⁵ as well as in the Convention's approach,⁴⁶ which appears to accept that universal regulation is possible only if there is flexibility of standards rather than uniformity; but there is no similar acceptance of any double or national standard for seabed pollution, dumping, or flag state regulation of vessel pollution.⁴⁷

If the function of the rules of reference in the Convention is thus somewhat varied, it is nonetheless clear. The same cannot be said when it comes to identifying precisely which rules and standards are being referred to. Throughout the Convention there are references to "international rules and standards," "internationally agreed rules," "generally accepted rules" and "global rules," with no obvious uniformity in terminology or clarity of meaning.⁴⁸ International rules for the control of vessel pollution, to take one example, are contained in the 1954 London Convention, with its later amendments, and in the 1973 marine pollution Convention. At least some delegations at the conference understood the latter Convention as representing the appropriate international rules,⁴⁹ but there is a measure of uncertainty and ambiguity about this interpretation, as there is also for the comparable provision allowing coastal state regulation of pollution in the exclusive economic zone (EEZ).⁵⁰ What exactly do "generally accepted" or other similar phrases mean in this context? One interpretation would require widespread ratification or incorporation in national law,⁵¹ and some commentators have argued that only those conventions which have achieved the status of customary law can be regarded as setting international

⁴⁵ See the regional seas agreements cited at note 15 *supra*; the Paris Convention, *supra* note 26; and the Convention on Long-Range Transboundary Air Pollution done at Geneva, Nov. 13, 1979, 18 ILM 1442 (1979). Under these agreements, land-based pollution in Europe is subjected to stricter and more detailed standards than elsewhere; other regional agreements merely commit states to taking "all appropriate measures" without further elaboration. The Athens Protocol of 1980 on land-based sources of pollution in the Mediterranean, *supra* note 15, sets detailed standards but allows for flexibility to accommodate the diverse levels of development and capacity in the region. None of the Conventions sets specific standards for airborne pollution. See generally Boyle, *supra* note 15.

⁴⁶ Article 207(4) specifically allows states to take account of "characteristic regional features, the economic capacity of developing States and their need for economic development" when regulating land-based pollution.

⁴⁷ Dumping and seabed operations may be the subject of regional controls, but the Convention requires that they conform to international standards. See Convention, Arts. 208(3) and (5), 210(4) and (6).

⁴⁸ See, e.g., *id.*, Arts. 21(2) and (4), 39(2)(a) and (b), 41(3), 53(8), 60(5) and (6), 94(2) and (5), 211(5), 217, 226. See generally Bernhardt, *A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference*, 20 VA. J. INT'L L. 265 (1980); van Reenen, *Rules of Reference in the New Convention on the Law of the Sea*, 12 NETH. Y.B. INT'L L. 3 (1981); Vignes, *La Valeur juridique de certaines règles, normes ou pratiques mentionnées au TNCO comme "généralement acceptées"*, 1979 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 712; 2 G. TIMAGENIS, *INTERNATIONAL CONTROL OF MARINE POLLUTION* 603-07 (1979).

⁴⁹ See U.S. DELEGATION REPORTS, *supra* note 42, at 131-33; and Schneider, *supra* note 16.

⁵⁰ Convention, Art. 211(5); and see below.

⁵¹ See, e.g., G. TIMAGENIS, *supra* note 48, at 606.

rules or standards.⁵² Either of these interpretations would probably cover the 1954 Convention and the 1972 London Convention on dumping,⁵³ but they would impose a very substantial burden of acceptability that the 1973 Convention could not meet.⁵⁴ Thus, as regards vessel pollution, these interpretations would be unduly favorable to maritime states and would merely perpetuate the application of an obsolescent convention not designed for the control of pollution under modern conditions of tanker operations. More generally, to insist on widespread ratification or acceptance in customary law before the duty to regulate is perfected would not encourage broader adoption of international rules and standards for all sources of pollution.

The intention behind these rules of reference is, in most cases, to give effective content to the regulatory duties of states, or in the case of coastal states, to limit their assumption of regulatory power.⁵⁵ The Convention should be construed with that object and purpose in mind. An alternative interpretation to those mentioned above, one more consistent with that aim, would concentrate on securing the incorporation of those conventions, such as the 1973 Convention, which are intended to represent the international community's most recent formulation of relevant rules and standards, provided only that they have been ratified by enough states to enter into force. The strength of this approach, but also, in contrast to other interpretations, its difficulty, is that it would place on parties to the Law of the Sea Convention a duty to adopt rules and standards in other conventions to which they might not and need not be parties. This might be thought to be an unacceptable intrusion on the sovereignty of states,⁵⁶ but any less radical formulation requiring ratification or adoption in national law by a larger number of states leads back to the problems referred to earlier. Whichever interpretation is adopted, the result, to a greater or lesser degree, will be to limit the traditional freedom of states to refuse to ratify or apply relevant multilateral conventions; but if the object of the pertinent provisions of the Law of the Sea Convention is to bring about the widest possible application of international rules, this conclusion seems inescapable.

There is also some doubt over the distinction, if there is one, between "rules" and "standards." The meaning of "rules" as a form of potentially binding obligation is clear enough, but are "standards" intended to refer, by contrast, to resolutions of the International Maritime Organization (IMO) and other such nonbinding instruments, or is the distinction merely

⁵² This is the position adopted by van Reenen, *supra* note 48, who argues that "generally accepted rules" are those which meet the test for customary law applied in the North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20); cf. Bernhardt and G. TIMAGENIS, *supra* note 48, who reject this interpretation.

⁵³ The 1954 Convention, which entered into force in 1958, has 67 ratifications; the 1972 London Dumping Convention, which entered into force in 1975, has 52 ratifications.

⁵⁴ The MARPOL Convention entered into force in October 1983, and has 12 parties.

⁵⁵ See below.

⁵⁶ Cf. G. TIMAGENIS, *supra* note 48, at 606, who notes the possible objection that small minorities of states would be able to impose their wishes on others.

descriptive of different categories of obligation? This question raises in even starker form the issue of the imposition on states of duties derived from sources by which they would not otherwise be bound, but here there seems less to be said in favor. States should be allowed the freedom to make collective recommendations without their becoming instantly and indirectly a form of binding obligation. If this observation is correct, then "standards," like "rules," should be restricted to those laid down in instruments intended to be binding,⁵⁷ and for this purpose nothing of substance turns on the difference in terminology.

It is doubtful how far any of the foregoing represents preexisting customary international law. Insofar as there have been customary obligations concerning pollution, they have been obligations imposing responsibility for causing loss or damage to other states,⁵⁸ not for protecting the marine environment or controlling pollution by regulation. The most striking achievement of the Convention in this regard is the creation of a legal regime whose primary focus is not on obligations of responsibility for damage, but on comprehensive regulation to prevent and control marine pollution. But serious weaknesses remain. To say that states have a duty to regulate pollution is to beg the question what regulations they must adopt, a question the Convention does not satisfactorily answer. Its use of rules of reference is sensible in principle but flawed in practice by the failure to specify with clarity when existing or future rules and standards become applicable and by the dilution of the role of international rules and standards for land-based and atmospheric pollution. Above all, there is an insidious uncertainty about too much of the phraseology and a danger it may be used to undermine the Convention's effectiveness.⁵⁹ Though in appearance the regulation of pollution may be obligatory, there may remain a significant level of discretion and a continued role for the creative function of state practice in defining the acceptable content of pollution obligations and their limits.

Coastal State Powers of Regulation

Faced with the inadequacy of contemporary arrangements for controlling pollution at sea, a strong lobby of states, including notably Canada and Australia, exerted considerable pressure at the conference for a general extension of coastal state legislative powers in the territorial sea and in an

⁵⁷ For the view that "standards" is simply another term for regulations, rules or norms, see remarks of the Swedish delegate, July 17, 1974, 2 OFFICIAL RECORDS, *supra* note 23, at 323.

⁵⁸ Trail Smelter arbitration, 3 R. Int'l Arb. Awards 1905 (1941); Corfu Channel case, 1949 ICJ REP. 4 (Judgment of Apr. 9); Lac Lanoux arbitration, 12 R. Int'l Arb. Awards 281 (1957). See below.

⁵⁹ See Bernhardt, *supra* note 48, who argues that the ambiguity of the phraseology of the Convention in using rules of reference may in effect give states a power to set their own standards.

extended zone beyond it.⁶⁰ Some states, especially Canada,⁶¹ had already begun to claim pollution control zones beyond the territorial sea, but these claims were strongly opposed by major maritime powers who feared that the extension of coastal state legislative control would interfere with the freedom of navigation and might lead to the application of a variety of standards affecting vessels.

There was general agreement at the conference that coastal states should continue to have jurisdiction over pollution in the territorial sea and that, in principle, they should be given jurisdiction to protect and preserve the marine environment within the exclusive economic zone.⁶² The conference also acknowledged the duty of coastal states to regulate pollution from seabed activities and installations under their jurisdiction in the EEZ and continental shelf,⁶³ and they were given power to regulate dumping in these zones.⁶⁴ But the extension of coastal state powers over vessels remained controversial; thus, it is not possible to characterize the result of the conference as a straightforward extension of coastal state power at the expense of the flag state. Instead, the creation of the exclusive economic zone involved a compromise between the competing claims of flag states and coastal states: on the one hand, the EEZ regime conferred regulatory jurisdiction over all sources of pollution including vessel pollution on the coastal state;⁶⁵ on the other, that regulatory jurisdiction in respect of vessels was limited to the application of international rules for enforcement purposes only.⁶⁶

Thus, although the Convention leaves untouched the exclusive responsibility of the flag state for the regulation of vessel pollution on the high seas,⁶⁷ the new EEZ regime does involve a significant redistribution of power to the coastal state in pollution matters over a geographically much larger area. In other respects, however, this change is considerably less radical than some states had hoped. The real debate at the conference on extending coastal state jurisdiction over vessels was not about whether coastal states should have authority over a wider area of sea, but about who should be entitled to set applicable regulations and what these rules and standards should include. Should they be international rules and standards or should coastal states have the power to determine their own national regulations? Should there be limitations on the range of matters the coastal state would be entitled to regulate? Both of these questions

⁶⁰ See 2 OFFICIAL RECORDS, *supra* note 23, at 317-20; U.S. DELEGATION REPORTS, *supra* note 42, at 47-51, 74 and 89; R. M'GONIGLE & M. ZACHER, *supra* note 2, ch. 6.

⁶¹ Arctic Waters Pollution Act 1970, in 1 NEW DIRECTIONS, *supra* note 4, at 199; U.S. reply, *id.* at 211; and see D. PHARAND, THE LAW OF THE SEA OF THE ARCTIC, WITH SPECIAL REFERENCE TO CANADA (1973).

⁶² See Convention, Arts. 21 and 56(1).

⁶³ *Id.*, Arts. 56, 60, 80, 208.

⁶⁴ *Id.*, Art. 210.

⁶⁵ See *id.*, Arts. 56 and 211(5). Article 234 gives coastal states special powers in ice-covered areas, on which see below.

⁶⁶ *Id.*, Arts. 211(5) and 220(3), (5) and (6).

⁶⁷ *Id.*, Arts. 211, 217.

were of particular concern to maritime states, whose clear preference for international rules and standards and for excluding construction, design, equipment and manning from the purview of coastal state power the Convention substantially recognizes.⁶⁸

For the territorial sea, the final compromise was not in any sense an extension of coastal state regulatory jurisdiction but a clarification and definition of its limits. Article 17 of the Convention on the Territorial Sea and the Contiguous Zone had merely required foreign ships exercising the right of innocent passage to comply with the laws of the coastal state, insofar as these were in conformity with the Convention and other rules of international law and did not hamper innocent passage.⁶⁹ Although the coastal state's regulatory power was therefore not unlimited, it was nevertheless a power to adopt national, rather than international, rules, a power exercisable within relatively broad and imprecise limits. The Law of the Sea Convention contrasts strongly with this by specifying the matters on which the coastal state may legislate, including under Article 21, the safety of navigation, the preservation of the environment of the coastal state, and the prevention, reduction and control of pollution.⁷⁰ The Convention retains the basic preference for national rules and standards in the territorial sea, however, and in effect allows the coastal state to adopt its own pollution discharge rules for foreign vessels; there is no requirement that these conform to international standards, whether those contained in the 1954 or 1973 Conventions or otherwise.⁷¹

There are two important limitations on this power of the coastal state to legislate for pollution control in the territorial sea. The obligation not to hamper, deny or impair the right of innocent passage remains,⁷² and the right of innocent passage is itself defined in much more detailed and specific terms by Article 19. Vessels causing pollution will only cease to be in innocent passage if the pollution is "wilful and serious," which probably excludes most typical operational discharges of oil because, though they may be "wilful," they are more rarely "serious." The effect of these provisions thus seems to strengthen the hand of flag states in resisting intrusive legislative inroads on their vessels' right of passage, despite the apparent power of the coastal state to set its own standards for pollution control.

Maritime states were also successful, after much debate, in securing the exclusion of coastal state regulation of the design, construction, manning

⁶⁸ See, in particular, U.S. DELEGATION REPORTS, *supra* note 42, at 131-33; compare the positions of the Canadian and British delegations in 2 OFFICIAL RECORDS, *supra* note 23, at 312-20; 4 *id.* at 82-86; and 6 *id.* at 101. See also the Bulgarian delegate's remarks, 6 *id.* at 112.

⁶⁹ Convention, Art. 15.

⁷⁰ See also *id.*, Art. 211(4).

⁷¹ *Id.* Parties to the 1973 MARPOL Convention, *supra* note 4, are obliged by its Article 4(2) to prohibit violation of the Convention by vessels within their jurisdiction, but they are not debarred from adopting stricter standards.

⁷² Convention, Arts. 24 and 211(4).

and equipment of foreign ships unless such rules give effect to "generally accepted international rules or standards."⁷³ This provision and the reference in Article 23 to special precautions established by international agreement for nuclear-powered ships and ships carrying inherently dangerous or noxious substances are the only places in the Convention where coastal state power in the territorial sea is confined to the adoption of international standards. Although Article 22, which permits the use of sea lanes and traffic separation schemes, requires the coastal state to "take into account" the recommendation of the "competent international organization,"⁷⁴ this formulation, like other similar ones, seems to leave the coastal state broad discretion to draw up its own national routing schemes. That interpretation appears to be consistent with state practice in the territorial sea.⁷⁵

The territorial sea regime envisaged by the Convention is thus a compromise: it offers coastal states power to control navigation and pollution, while preserving rights of passage and international control of the construction, design, equipment and manning standards for vessels.⁷⁶ This result, in substance, endorses the position that had prevailed in practice before the Convention, but by substituting more precise definitions for formerly vague limitations, the Convention preserves the rights of maritime flag states more securely from future erosion.

The extension of coastal state legislative jurisdiction to cover vessel pollution in the exclusive economic zone is more clearly controlled by and limited to the application of international standards. Here the coastal state has jurisdiction over the protection and preservation of the marine environment, but it must have due regard for the rights and duties of other states,⁷⁷ which include the right of navigation.⁷⁸ Article 211(5) specifies that coastal state regulations for the control of pollution from vessels should conform and give effect to "generally accepted international

⁷³ Art. 21(2). See U.S. DELEGATION REPORTS, *supra* note 42, at 131-33. The standards most likely to fit this provision are those established by the IMO in the Safety of Life at Sea Conventions of 1960 (*done* at London June 17, 1960, 16 UST 185, TIAS No. 5780, 536 UNTS 27), and 1974 (*done* at London Nov. 1, 1974, *reprinted in* 14 ILM 959 (1975)), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of 1978, Cmd. No. 7543, and a number of ILO Conventions. See R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA*, ch. 12 (1983).

⁷⁴ Presumably the IMO. There is an obligation under Article 211(1) to establish international standards for routing schemes. Such standards have been developed by the IMO: see the Convention on the International Regulations for Preventing Collisions at Sea, *done* at London Oct. 20, 1972, 28 UST 3459, TIAS No. 8587, *reprinted in* 4 NEW DIRECTIONS, *supra* note 4, at 245; and IMO Res. A.378 (X) (1977) and A.428 (XI) (1979).

⁷⁵ For a detailed survey of traffic separation and vessel management schemes, see Gold & Johnston, *supra* note 25, at 164-78. See also Fitch, *Unilateral Action versus Universal Evolution of Safety and Environmental Protection Standards in Maritime Shipping of Hazardous Cargoes*, 20 HARV. INT'L L.J. 127 (1979).

⁷⁶ See Popp, *Recent Developments in Tanker Control in International Law*, 1980 CAN. Y.B. INT'L L. 3. For a critical analysis of this part of the Convention, see R. M'GONIGLE & M. ZACHER, *supra* note 2, at 244-45.

⁷⁷ Convention, Art. 56.

⁷⁸ *Id.*, Art. 58.

rules and standards established through the competent international organization or general diplomatic conference." This formulation seems to leave the coastal state no discretion in the adoption of rules and standards. Clearly, it is not entitled to set more onerous rules or standards for vessel pollution than those accepted internationally, but it does not seem able to apply lower standards either, since these would not "conform to or give effect to" international rules and standards.⁷⁹ Paradoxically, since regulation of vessel pollution in the economic zone is not obligatory,⁸⁰ the coastal state may simply refuse to adopt any rules or regulations. The difficulty of deciding what constitutes "generally accepted international rules and standards" applies here as well,⁸¹ but most delegations at the conference appear to have had the 1973 marine pollution Convention in mind.⁸²

Special circumstances in the economic zone are provided for in two ways. Zones of special mandatory measures for the prevention of vessel pollution may be authorized by the IMO ("the competent international organization"). The coastal state may then adopt international rules and standards for special areas promulgated by the IMO, or adopt its own national laws, provided these relate only to discharge or navigation and not to construction, design, equipment or manning.⁸³ Only within ice-covered areas does the coastal state have a general power to apply national standards to EEZ pollution control, provided they have due regard for navigation and are nondiscriminatory.⁸⁴ This exception was a concession to Canadian interests in the Arctic Ocean,⁸⁵ but its limited application does not seriously affect the general conclusion that for vessel pollution in

⁷⁹ This interpretation is consistent with Article 4(2) of the 1973 MARPOL Convention, *supra* note 4, which requires states to apply its provisions to areas within their jurisdiction. "Jurisdiction" for this purpose now probably includes the economic zone, under the terms of Article 5(3), which provides: "The term 'jurisdiction' . . . shall be construed in the light of international law in force at the time of application or interpretation of the present Convention." See also the vessel pollution provisions of the UNEP regional seas agreements, *supra* note 15. These require coastal states to ensure effective implementation or compliance with internationally recognized rules in the area covered by each agreement, which in most cases includes the economic zone.

⁸⁰ Convention, Art. 211(5).

⁸¹ See above.

⁸² See references in note 49 *supra*. State practice on the application of pollution regulations in the economic zone varies, and much of the legislation either contains no reference to pollution control or merely gives power in general terms to make regulations. See Burke, *National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea*, 9 OCEAN DEV. & INT'L L. 289 (1981); and Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321 (1979). Burke notes that over one-third of the zone legislation examined by him asserts authority exceeding that provided for by the Law of the Sea Convention.

⁸³ Convention, Art. 211(6). Under Annex 1, Reg. 10 of the MARPOL Convention, *supra* note 4, the Mediterranean, Black, Red and Baltic Seas and the Persian Gulf and Gulf of Oman are designated as special areas where no discharge of oil, oily mixtures or other noxious substances is permitted save in very restricted circumstances. These are all enclosed or semi-enclosed seas.

⁸⁴ Convention, Art. 234.

⁸⁵ R. M'GONIGLE & M. ZACHER, *supra* note 2, at 246-47.

the zone, the Convention favors the application of international, rather than national, rules and standards.

All told, this compromise scheme does not add up to the dramatic extension of coastal state legislative jurisdiction over vessel pollution that some states had originally sought. Apart from concessions over special areas and ice-covered zones, the Convention serves the interest of maritime states in ensuring uniformity of standards in the economic zone and, above all, in preserving their ability to influence the formulation of those standards through the IMO.⁸⁶ Herein lies the importance of the distinction between coastal state legislative power over vessels in the territorial sea and in the exclusive economic zone. Only in the territorial sea is the coastal state in most respects the sole judge of its interests, within the limits imposed by the Convention.⁸⁷ In the economic zone it has no such discretion over the rules it may apply. Not only does that power lie primarily with the states that make up the IMO, but the international regulations adopted through that institution are an expression of compromise and common interest among the various groups represented there, and not merely of the interests of coastal states.⁸⁸ For this reason, the articles on vessel pollution in the economic zone are better understood not as an attempt to give the coastal state more power at the expense of the flag state, but as part of a policy of strengthening and making more effective the primary duty of flag states to control their own vessels. In this sense, the coastal state's legislative role in the zone is a secondary or subsidiary one, more important for enforcement purposes than as an example of legislative jurisdiction.⁸⁹

III. ENFORCEMENT JURISDICTION

Historically, enforcement has always been the weakest part of international efforts to regulate marine pollution. While land-based, atmospheric and seabed pollution fell clearly within the enforcement power of the coastal state alone, there was certainly no duty under international law to enforce whatever regulations states might at their discretion have adopted to deal with these matters. International law had little to say on this subject. Enforcement powers over vessels for pollution and dumping rested

⁸⁶ Maritime state influence in the IMO has in the past been considerable. *See id.*, chs. 3 and 7; and Fitch, *supra* note 75.

⁸⁷ In practice, many states apply regulations in the territorial sea that do not exceed the 1954 or 1973 Conventions on pollution. *See, e.g.*, New Zealand, Marine Pollution Act 1974, No. 14; Malta, Marine Pollution (Prevention and Control) Act 1977, Act No. XII, §4; United Kingdom, Merchant Shipping (Oil Pollution) Act 1971, ch. 59; and Merchant Shipping Act 1979, ch. 39, §20; *but cf.* United States, Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified in scattered sections of 33 U.S.C.).

⁸⁸ For an analysis of the role of the IMO in formulating standards for vessel pollution, see Gold & Johnston, *supra* note 25, at 157; and Churchill, *The Role of I.M.C.O. in Combating Marine Pollution*, in *THE IMPACT OF MARINE POLLUTION*, *supra* note 3, at 73.

⁸⁹ Significantly, Article 211(5) gives the coastal state legislative power in the economic zone only "for the purpose of enforcement as provided for in section 6."

primarily with the flag states, save that coastal states did have the right to arrest and prosecute for offenses committed in the territorial sea. This right was subject in turn to the right of innocent passage, and under the Convention on the Territorial Sea and the practice of some states was only exercisable, as a matter of comity, where the consequences of the violation affected the coastal state;⁹⁰ but customary law probably allowed a general power of enforcement for pollution and dumping in the territorial sea.⁹¹ Both the 1973 Convention on marine pollution and the 1972 London Convention on dumping required coastal states to apply and enforce their provisions against all vessels in the territorial sea.⁹²

A limited concept of port state jurisdiction also developed in customary law, allowing prosecution for violations in the territorial sea and internal waters of the port state. The 1973 Convention on marine pollution additionally permitted port state inspection with a view to reporting any violation to the flag state.⁹³ Otherwise, enforcement was entirely a matter for the flag state, which, apart from an obligation to enforce the 1973 Convention,⁹⁴ was free to choose what action, if any, to take. Surveys of violations reported and prosecutions undertaken have consistently shown the unwillingness of many flag states to enforce pollution laws against their vessels with any vigor, although difficulties of proving violations have contributed substantially to an indifferent record of enforcement by coastal and flag states alike.⁹⁵ Considering this generally abysmal record of enforcement and compliance, it is not surprising that the construction of a more impressive and effective enforcement regime became one of the major pollution issues at the Law of the Sea Conference.

The Convention is notable for imposing on states a duty to enforce regulations on all sources of pollution,⁹⁶ but the provisions on vessel pollution are again the most interesting. These represent an extension, rather than a radical revision of, the existing law. Many of the changes had previously been debated, though shelved, at the 1973 conference on marine pollution; they do reflect some movement away from the primacy of flag state enforcement jurisdiction. There are two elements in this revised framework. Firstly, the obligation of flag states to ensure compliance

⁹⁰ Art. 19, Convention on the Territorial Sea, *supra* note 27.

⁹¹ See R. CHURCHILL & A. LOWE, *supra* note 73, at 74-76.

⁹² Art. 4(2), MARPOL Convention, *supra* note 4; Art. 7(1) and (2), Convention on the Prevention of Marine Pollution by Dumping, *supra* note 5.

⁹³ MARPOL Convention, *supra* note 4, Art. 6(2). See also Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, Paris 1982, reprinted in 21 ILM 1 (1982), which provides for port state inspection in Europe.

⁹⁴ MARPOL Convention, *supra* note 4, Arts. 4(1) and 6(4).

⁹⁵ See generally R. M'GONIGLE & M. ZACHER, *supra* note 2, ch. 6; Birnie, *Enforcement of the International Laws for Prevention of Oil Pollution from Vessels*, in THE IMPACT OF MARINE POLLUTION, *supra* note 3, at 95; D. ABECASSIS, OIL POLLUTION FROM SHIPS, ch. 4 (1978); Lowe, *The Enforcement of Marine Pollution Regulations*, 12 SAN DIEGO L. REV. 624 (1975). See also GA Res. 34/183 (1979).

⁹⁶ Convention, Arts. 213, 214, 216, 217(1), 222.

by their vessels with applicable pollution standards is reiterated,⁹⁷ but in much stronger form than hitherto. This obligation expressly includes such matters as prohibiting substandard vessels from putting to sea,⁹⁸ ensuring that vessels obtain appropriate international certificates for seaworthiness and other requirements and are inspected regularly,⁹⁹ investigating and prosecuting alleged violations of pollution laws¹⁰⁰ and ensuring that penalties imposed are adequate.¹⁰¹ Clearly, if properly adhered to, these provisions would greatly increase the effectiveness of flag state jurisdiction as the main means of control over shipping.

Secondly, it was generally accepted that strengthening flag state duties would not alone be sufficient to remedy existing inadequacies. The more contentious issue was whether to enhance the enforcement power of the coastal state and extend it to the whole economic zone or to concentrate instead on increased use of port state jurisdiction as the main complement to flag state power. The advantage of increasing coastal state jurisdiction was that it would enable those states that suffered most from poor enforcement to act for themselves, but the disadvantages of such a radical redistribution of power were the threat it would pose to unimpeded freedom of navigation, particularly in the economic zone, and the practical difficulty of stopping and arresting ships in passage. From this point of view, increased port state jurisdiction emerged as the more attractive solution by far, for it presented no dangers to navigation and more readily afforded facilities for investigation and the collection of evidence.¹⁰²

After much debate, the conference settled on a compromise between the two approaches, extending coastal state powers in certain limited respects, but according a significantly greater role to the port state. The coastal state retains its power to investigate, arrest and prosecute vessels in the territorial sea for violation of pollution laws,¹⁰³ but it is not given plenary competence in the economic zone. There its powers are graduated according to the degree of harm threatened. Arrest and prosecution may only be undertaken when pollution causes or threatens "major damage" to the coastal state.¹⁰⁴ The coastal state may inspect the vessel if there is at least "substantial discharge" causing or threatening "significant pollution,"¹⁰⁵ but if none of these conditions is met, the coastal state may only require information about the identity of the ship and its next port of call.¹⁰⁶ These rather vague gradations may well be open to liberal interpretation by coastal states, but they plainly amount to rather less than plenary power to enforce international pollution standards in the exclusive economic zone. Save where the coastal state is itself threatened by the pollution, its role is limited to collecting the necessary information to

⁹⁷ *Id.*, Art. 217(1).

⁹⁸ *Id.*, Art. 217(2).

⁹⁹ *Id.*, Art. 217(3).

¹⁰⁰ *Id.*, Art. 217(4), (5), (6), (7).

¹⁰¹ *Id.*, Art. 217(8).

¹⁰² See Lowe, *supra* note 95; and Bernhardt, *supra* note 48, at 313.

¹⁰³ Convention, Art. 220(2). This is subject to the right of innocent passage.

¹⁰⁴ *Id.*, Art. 220(6).

¹⁰⁵ *Id.*, Art. 220(5).

¹⁰⁶ *Id.*, Art. 220(3).

invoke flag state or port state enforcement; its jurisdiction in the economic zone is thus strictly protective, rather than fully territorial, in character.

The port state may as before investigate and prosecute any violation of applicable rules in its own territorial sea or economic zone,¹⁰⁷ but—in a novel development—it may also investigate and prosecute pollution discharge violations on the high seas or within the jurisdictional zones of other states.¹⁰⁸ Though free to act on its own initiative in respect of high seas offenses, the port state may prosecute for violations within the coastal waters of another state only if requested to do so by the coastal or flag state concerned.¹⁰⁹ In this latter respect, therefore, the port state functions as an agent, ensuring prosecution where the coastal state is incompetent to act, while in other cases, it facilitates prompt prosecution where the vessel is unlikely to sail within reach of the flag state's jurisdiction.

How far do these provisions diminish the traditional primacy of flag state jurisdiction? Only partially, it seems. Flag states no longer enjoy sole and exclusive jurisdiction over offenses on the high seas. Their enforcement jurisdiction is now in all respects concurrent at least with that of port states and in some cases, with that of coastal states as well. In principle, this change is clearly important, and there is some likelihood that, in practice, it may furnish more effective machinery for enforcing pollution laws. But this is not concurrent jurisdiction in the ordinary sense, entitling either party to prosecute. The new powers of coastal and port states are subject to one very important limitation in the form of flag state preemption, which enables the flag state to insist on taking over the proceedings itself, except in cases of major damage to the coastal state.¹¹⁰ It must, of course, continue the proceedings and it loses its right if it repeatedly disregards its obligations;¹¹¹ moreover, preemption does not apply to coastal state proceedings for territorial sea offenses or port state proceedings for offenses in the port state's own territorial sea or economic zone.¹¹² Nevertheless, in most cases, it is ultimately the flag state that alone will determine whether proceedings by coastal states or port states will be allowed. The loss of exclusive jurisdiction is in this sense severely qualified, and as one commentator has put it, unless the bona fides of the flag state can really be assured, the provision could effectively destroy the impact of the coastal and port states' prosecutory power.¹¹³ As with other parts of the Convention, these apparent changes in fundamental principles must therefore be treated with some caution.

IV. RESPONSIBILITY, LIABILITY, INTERVENTION AND NOTIFICATION

In traditional customary international law, responsibility for loss or damage represented the only significant general principle mitigating the

¹⁰⁷ *Id.*, Art. 220(1).

¹⁰⁸ *Id.*, Art. 218.

¹⁰⁹ *Id.*, Art. 218(2).

¹¹⁰ *Id.*, Art. 228(1).

¹¹¹ *Id.*

¹¹² *Id.* The right of preemption does apply to coastal state proceedings in respect to EEZ violations.

¹¹³ R. M'GONIGLE & M. ZACHER, *supra* note 2, at 249.

freedom to pollute the seas. Although the Law of the Sea Convention exemplifies the transition to a legal regime with an altogether wider foundation, emphasizing obligations of regulation and control, state responsibility remains instrumental in defining obligations to compensate for injury to other states or to the environment caused by pollution. The Convention has made some important changes in these respects and in the related issue of coastal state rights to notification of and self-protection from threatened or imminent pollution.

Injury to Other States or to the Environment

Principles of state responsibility for pollution damage in customary law are usually derived from the *Trail Smelter* arbitration,¹¹⁴ the *Corfu Channel* case¹¹⁵ and the *Lake Lanoux* arbitration.¹¹⁶ These decisions appear to put states under an obligation not to use or permit the use of their territory to cause loss or damage to another state, and it has been assumed that this principle is applicable by extension to damage caused by marine pollution emanating from another state or from activities under another state's jurisdiction or control.¹¹⁷ These customary principles are expressed at a high level of generality and as regards marine pollution are supported by little evidence of state practice. It has thus been difficult to determine with any degree of particularity the scope and content of primary obligations for whose default states may be held liable to make reparation.¹¹⁸ In addition, it is uncertain to what extent responsibility in customary law is strict or requires fault,¹¹⁹ and views differ over the circumstances in which a state should be held responsible for the actions of its nationals.¹²⁰ The availability at the international level of declaratory or injunctive relief for environmental damage is also a controversial issue.¹²¹

Many of these problems derive from uncertainties about the principles of state responsibility in general, and they can only be resolved in the

¹¹⁴ 3 R. Int'l Arb. Awards 1905 (1941).

¹¹⁵ 1949 ICJ REP. 4 (Judgment of Apr. 9).

¹¹⁶ 12 R. Int'l Arb. Awards 281 (1957).

¹¹⁷ See generally J. SCHNEIDER, *WORLD PUBLIC ORDER OF THE ENVIRONMENT*, ch. 6 (1979); Jenks, *Liability for Ultra-hazardous Activities*, 117 RECUEIL DES COURS 99 (1966 I); Goldie, *Liability for Damage and Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189 (1965); Goldie, *International Principles of Responsibility for Pollution*, 3 COLUM. J. TRANSNAT'L L. 283 (1970); Quentin-Baxter, *Preliminary Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law*, [1980] 2 Y.B. INT'L L. COMM'N, pt. 1, at 247, UN Doc. A/CN.4/SER.A/Add.1(2t.1). See also Principle 21 of the Stockholm Declaration on the Human Environment, reprinted in 11 ILM 1416, 1420 (1972).

¹¹⁸ See references in note 117 *supra*; and see also Handl, *The Environment, International Rights and Responsibilities*, 74 ASIL PROC. 223 (1980).

¹¹⁹ Goldie, Jenks and Schneider, *supra* note 117, argue that liability does not require fault; cf. I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, ch. 20 (3d ed. 1979).

¹²⁰ J. SCHNEIDER, *supra* note 117, at 163; see also the comments of the French and Jamaican delegates on July 17 and Aug. 5, 1974, respectively, 2 OFFICIAL RECORDS, *supra* note 23, at 330 and 364.

¹²¹ J. SCHNEIDER, *supra* note 117. See *Corfu Channel* case, 1949 ICJ REP. 4; and *Nuclear Tests Case* (Austl. v. Fr.), 1973 ICJ REP. 99 (Order of June 22).

wider context of a review of those principles as a whole. The International Law Commission is at present conducting such a review;¹²² the Law of the Sea Convention merely urges cooperation in the further development of the subject.¹²³ But the Convention does provide that states are responsible for fulfilling their international obligations concerning the protection and preservation of the marine environment,¹²⁴ and it now follows that, potentially, they may be held responsible for default of any of their environmental obligations under the Convention. By declaring those obligations expressly and in rather wider terms than hitherto, the Convention offers a surer foundation for the future development of the law of state responsibility on environmental matters.

Articles 194 and 198 reiterate the basic customary obligations to avoid causing pollution damage to other states or their environment and to notify them of imminent or actual damage,¹²⁵ but the Convention has a broader emphasis, concerned with the protection and preservation of the marine environment as such.¹²⁶ States are thus required to take all necessary measures to prevent, reduce and control pollution of the marine environment,¹²⁷ to prevent pollution from spreading beyond the areas where they exercise sovereign rights,¹²⁸ to prevent the transfer of pollution damage or hazards from one area to another or the transformation of one type of pollution into another,¹²⁹ and to prevent, reduce and control pollution from the use of technology or the introduction of new or alien species.¹³⁰ It is for breach of these provisions that Article 235 seems to contemplate the novel possibility of state responsibility for causing damage to the marine environment unconnected to loss or damage to the interests or environment of other states. This notion represents a considerable departure from arbitral awards like the *Trail Smelter* or *Lake Lanoux* decisions, and it is altogether more difficult. The Convention does not reveal how the concept of responsibility, expressed in its customary form as an obligation to make reparation, could usefully be applied to the causing of general environmental pollution when no state has suffered loss as a result. How would the damages be assessed and who would claim them? The Convention offers no guidance on these points and, as with other aspects of the subject, further development in state practice will be needed if effect is to be given to these still rather general principles.

Principles of liability in national law for causing pollution damage are likewise left for further development. Litigation in national courts in respect of marine pollution damage raises complex problems of choice of

¹²² The Commission's reports on state responsibility for internationally wrongful acts and responsibility for acts not prohibited by international law are both relevant. See, on the latter, [1978] 2 Y.B. INT'L L. COMM'N, pt. 2, at 149, UN Doc. A/CN.4/SER.A/1978/Add.1(pt.2); [1980] 2 *id.*, *supra* note 117, pt. 1, at 247; and on the former, the Commission's reports from 1969 onwards.

¹²³ Convention, Art. 235(3).

¹²⁵ Schneider, *supra* note 16, at 271-72.

¹²⁷ *Id.*, Art. 194(1).

¹²⁹ *Id.*, Art. 195.

¹²⁴ *Id.*, Art. 235(1).

¹²⁶ Convention, Arts. 192, 194(1).

¹²⁸ *Id.*, Art. 194(2).

¹³⁰ *Id.*, Art. 196.

law, applicable principles and jurisdiction of the courts over foreign defendants and foreign events,¹³¹ which, for the sake of uniformity, are best resolved by agreement and cooperation between states. This has been done successfully in the case of pollution from vessels,¹³² nuclear pollution¹³³ and seabed operations pollution,¹³⁴ where international conventions have settled issues of jurisdiction and provided self-contained codes of liability; but the attempt of the Convention to cover all forms and sources of pollution raises the possibility of providing for those not already covered. Here Article 235 is of little value. It does no more than require states to ensure that recourse is available under national law for pollution damage caused by persons subject to their jurisdiction, but there is no attempt to prescribe any detailed principles of liability or to provide for specific sources of pollution. Nor is it clear why the obligation to make recourse available is imposed on the state whose nationals have caused the damage; for good reasons of practicality, ease of proof and uniformity of damages, the 1969 Convention on civil liability requires proceedings to be brought in the courts of the victim's state,¹³⁵ whether or not the person causing the damage is otherwise subject to the jurisdiction of that state. There seems no good reason why Article 235 should contradict this considered preference.¹³⁶

Intervention and Notification

The right of coastal states to intervene on the high seas in cases of maritime casualties that cause or are likely to cause pollution damage was clarified by the 1969 Convention on intervention¹³⁷ after the *Torrey Canyon*

¹³¹ See D. ABECASSIS, *supra* note 95, chs. 8, 9 and 10.

¹³² Convention on Civil Liability for Oil Pollution Damage, with protocol, *supra* note 7; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, done at Brussels Dec. 18, 1971, reprinted in 11 ILM 284 (1972), with protocol, done at London Nov. 19, 1976, 16 ILM 617 (1977).

¹³³ The Convention on the Liability of Operators of Nuclear Ships, Brussels 1962, reprinted in 57 AJIL 268 (1963); the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials, done at Brussels Dec. 17, 1971, reprinted in 11 ILM 277 (1972).

¹³⁴ The International Convention on Civil Liability for Oil Pollution Damage resulting from the Exploration for and Exploitation of Seabed Mineral Resources, London 1977, reprinted in 6 NEW DIRECTIONS, *supra* note 4, at 535 (Churchill, Nordquist & Lay eds. 1977). The problems of bringing proceedings for pollution from seabed operations are well illustrated by the litigation resulting from the IXTOC-I blowout in the Gulf of Mexico. See the agreement between SEDCO Inc. and the U.S. Government, 22 ILM 580 (1983).

¹³⁵ International Convention on Civil Liability for Oil Pollution Damage, *supra* note 7, Art. IX.

¹³⁶ No discussion of this issue appears to be recorded in the published documents of the conference.

¹³⁷ International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *supra* note 6; extended to other forms of pollution by the Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, London 1973.

disaster raised doubts about the existence and basis of such a right in customary law. The Law of the Sea Convention makes no attempt to deal with this issue directly and merely preserves without prejudice the rights of states under customary and conventional law to intervene beyond the territorial sea.¹³⁸ Suggestions were made by some states, notably France, to extend the right of intervention following the *Amoco Cadiz* disaster,¹³⁹ and Article 221, which originally had followed closely the wording of the 1969 Convention, eventually emerged with the references to "grave and imminent danger" of damage to the coastline deleted.¹⁴⁰ Intervention may now take place when there is merely "actual or threatened damage," which suggests the possibility of somewhat earlier action by the coastal state than might be permissible under the 1969 Convention.

Of course, the right of intervention, at whatever point, has little utility if the coastal state is kept in ignorance of impending disaster until it is too late to act. This was the real source of France's problems in the *Amoco Cadiz* incident, and it was a serious weakness of the 1969 Convention that it did not provide for prompt notification when a ship was in difficulties. The attempt of the Law of the Sea Convention to deal with the issue of notification is for that reason a more significant provision than any changes in the conditions for intervention. Flag states are now required to adopt regulations obliging vessels to give prompt warning to coastal states likely to be affected by incidents involving discharges or the probability of discharges,¹⁴¹ but this provision is not limited exclusively to maritime casualties; it covers all pollution incidents, including operational discharges, and thus establishes as a general principle the obligation contained in the 1973 Convention on marine pollution¹⁴² for all vessels to inform coastal states of pollution they have caused, whether accidentally or deliberately, lawfully or unlawfully.¹⁴³ States are also required to notify each other of the likelihood that they will be affected by pollution damage of which they become aware.¹⁴⁴ The latter obligation probably already represents customary law.¹⁴⁵

¹³⁸ Convention, Art. 221. A Russian proposal to incorporate a right of intervention was not accepted. For the text of this proposal, see UN Doc. A/CONF.62/C.3/L.25 (1975), 4 OFFICIAL RECORDS, *supra* note 23, at 212.

¹³⁹ See Lucchini, *La Lutte contre la pollution des mers: évolution ou révolution du droit international*, 1978 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 721.

¹⁴⁰ Compare Art. 222 of the Informal Composite Negotiating Text, 8 OFFICIAL RECORDS, *supra* note 23, with the final text of Art. 221; and see 8 OFFICIAL RECORDS at 152; 10 *id.* at 100.

¹⁴¹ Convention, Art. 211(7).

¹⁴² MARPOL Convention, *supra* note 4, Art. 8 and Protocol 1; see also Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil, Bonn, June 9, 1969, reprinted in 9 ILM 359 (1970), and other regional seas conventions.

¹⁴³ See Art. III of Protocol 1 of the MARPOL Convention, *supra* note 4.

¹⁴⁴ Convention, Art. 198.

¹⁴⁵ Corfu Channel case, 1949 ICJ REP. 3; see also MARPOL Convention, *supra* note 4, Art. 8; and the regional conventions referred to at note 15 *supra*. See generally Kiss, *supra* note 18, at 249-50.

V. CONCLUSIONS

The primary significance of the pollution provisions of the Law of the Sea Convention is clearly their formulation of a structure of principles governing all aspects of marine pollution prevention and control. Based on the general duty of protecting and preserving the marine environment, this structure is comprehensive as to sources and forms of pollution and in requiring states to take all necessary measures to prevent, reduce and control marine pollution. In addressing issues of regulation, enforcement and cooperation, it reflects a fundamental shift from power to duty as the central controlling principle of the legal regime of the marine environment, and a transition from a regime based on obligations of responsibility for damage to one based on obligations of regulation and control.

International rules and standards established by the international community acting through the competent international organizations or diplomatic conferences will now in most cases provide the minimum basis for the fulfillment of the duty to regulate pollution. Enforcement action for all sources of pollution will also for the first time be a duty for states, while in respect of vessels, the flag state must share its traditional primacy in enforcement matters with a more general concurrent port state jurisdiction and a wider coastal state protective jurisdiction. The content of state responsibility, including in its widest sense not merely an obligation to compensate for loss but associated principles for the allocation and mitigation of risk through notification and intervention, is more fully defined and is placed, again for the first time, on a generalized conventional basis. Obligations of cooperation, assistance and monitoring may ensure that states are better able to combat pollution effectively. There do remain defects and uncertainties in many parts of this legal regime, affecting especially the content of international rules and standards, but these should not detract from the conclusion that the Convention has succeeded in drawing together a framework of general principles that gives structure to the hitherto rather piecemeal efforts to control pollution. Clearly, in the light of these provisions, it is no longer accurate to talk of there being in any sense a freedom to pollute the seas.

A second important sense in which the legal regime of the Convention can be seen as comprehensive is in its emphasis on protecting the marine environment as a whole. This aspect appears most obviously in the inclusion of a general obligation to protect and preserve the marine environment, in the requirement to take measures to prevent, reduce and control pollution of the marine environment and not merely the environment of other states, in the extension of port state jurisdiction to cover high seas pollution offenses and in the statement that "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment." The development of international law governing marine pollution has not typically been concerned with the marine environment in this way, but has instead tended to be a response to the claims of coastal states for greater protection from

the perils of pollution affecting or likely to affect them. International attention has therefore concentrated on pollution of coastal waters and issues of immediate concern to coastal states such as civil liability regimes for damage caused to their interests, greater powers of intervention and wider zones of jurisdiction over shipping. In comparison, protection of the high seas beyond coastal areas and of the marine environment generally has received less attention, and this is true even of the 1954 and 1973 Conventions on marine pollution. The Stockholm Declaration on the Human Environment recognized the need for wider concern with the marine environment as a whole, and this gradual change of emphasis is reflected in the provisions of the Law of the Sea Convention.

The significance of this development, however, should not be exaggerated. The bulk of marine pollution comes from land-based sources and, as indicated above, the level of international control over this pollution remains minimal, except in those regional seas such as the Mediterranean where more concerted action has been achieved. A more telling question is whether international law, in general, and the Law of the Sea Convention, in particular, have really provided machinery capable of giving effect to the general obligation to protect and preserve the marine environment. As one commentator explains: "This general problem is especially acute with international environmental law, as the important question, 'who shall speak for the commons?' or even, more conservatively, 'who can speak for the commons?' remains largely unresolved."¹⁴⁶

Regional cooperation agreements will assume considerable importance in this regard by helping to ensure that states possess or have access to adequate means of combating pollution and by providing a more immediate focus for putting pressure on them to comply with their obligations under the Convention and international law;¹⁴⁷ but beyond the limits of national jurisdiction, the sole mechanism for control of pollution remains, as it always has, action taken by the flag state,¹⁴⁸ aided perhaps by port state enforcement powers. Despite the attempt in the Convention to strengthen flag state obligations and provide for better enforcement, the effectiveness of this form of control must remain questionable; and the provision for state responsibility in respect of damage to the marine environment as such will be of doubtful effect where no state has suffered sufficient damage to have an interest in seeking redress. It is at this point especially that the role of international organizations, particularly UNEP¹⁴⁹ and the IMO,¹⁵⁰ will become crucial to the implementation of the wider purpose under the Convention of securing more general protection for the marine environment.

¹⁴⁶ J. SCHNEIDER, *supra* note 117, at 89. ¹⁴⁷ *Id.* at 13. See also Boyle, *supra* note 15.

¹⁴⁸ Although the International Sea-Bed Authority will have responsibility under Article 145 for controlling pollution from activities on the deep seabed, the primary responsibility for adopting laws and regulations remains with states under Article 209.

¹⁴⁹ See GA Res. 2997 (XXVII) (1972), 3000 (XXVII) (1972), 3133 (XXVIII) (1973), 3436 (XXX) (1975), and 36/192 (1981).

¹⁵⁰ See UN Doc. A/CONF.62/27 (1974), 3 OFFICIAL RECORDS, *supra* note 23, at 43.

Finally, by including within the EEZ regime coastal state jurisdiction over pollution, the Convention alters, but only marginally, the balance between coastal and maritime states. Although the coastal state now has jurisdiction over the control of pollution up to the limit of the economic zone and has to this extent acquired enhanced rights and responsibilities, its jurisdiction over vessels remains restricted. Only in the territorial sea does it have the right to set national standards for pollution discharges, and its power to regulate the construction, design, equipment and manning of foreign vessels in the territorial sea or pollution discharges in the economic zone is limited to the application of international rules and standards. In the zone, its powers of enforcement over vessels are substantially less than they are for the territorial sea, and in many cases the coastal state must rely on port or flag state assistance. The rights of vessels to high seas passage in the economic zone and innocent passage in the territorial sea have thus been substantially preserved from abusive interference in the name of pollution control. This result is entirely characteristic of a convention that in environmental matters has proceeded cautiously and built on principles developed for the most part from existing law.

EDITORIAL COMMENTS

NICARAGUA v. UNITED STATES: JURISDICTION AND ADMISSIBILITY

I. JURISDICTION

By a vote of 15 to 1, the International Court of Justice decided on November 26, 1984, that it has jurisdiction to entertain the case brought by Nicaragua against the United States on April 9, 1984, charging the United States with violations of international law through use of military force, and intervention in Nicaragua's internal affairs in violation of her sovereignty, territorial integrity and political independence.¹

Although only the United States judge on the Court (Judge Schwebel) cast a negative vote and attached a dissenting opinion, views dissenting on certain holdings of the Court were pressed with more or less vigor by Judges Mosler, Oda, Ago, Sir Robert Jennings, Ruda and Nagendra Singh in their separate opinions.

Of the many issues raised in relation to the Court's Judgment, space will here permit treatment of only a few.

In separate votes, the Court found, by 11 votes to 5 (Mosler, Oda, Ago, Schwebel and Jennings), that it has jurisdiction "on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court," i.e., on the basis of compulsory jurisdiction conferred on the Court by the parties; and, by 14 votes to 2 (Ruda and Schwebel), that it has jurisdiction on the basis of provisions of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. Only the issue of compulsory jurisdiction can be discussed here.

The five judges who denied that the provisions for compulsory jurisdiction of the Court were applicable in the circumstances of the case stressed the failure of a ratification to be deposited with the Secretariat of the League of Nations by Nicaragua.

The records before the Court (paras. 15, 16) show that on September 24, 1929, Nicaragua signed the Protocol of Signature of the Statute of the Permanent Court of International Justice (part B of which contained the Optional Clause under which compulsory jurisdiction was assumed). The same day Nicaragua deposited a Declaration recognizing "as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice."

The Protocol of Signature (but not the Declaration) was subject to ratification. Ratification was approved by the Executive, the Senate, and the Chamber of Deputies of Nicaragua and notification that the Protocol and the Statute of the Court had "already been ratified" and that the

¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26). References to the Judgment in the text will be followed by parenthetical citations to the appropriate paragraph or paragraphs.

instrument of ratification would follow was sent to the Secretary-General of the League of Nations on November 29, 1939.

"It does not appear, however," a footnote to the *Yearbook of the International Court of Justice* has stated, and repeated over the years, "that the instrument of ratification was ever received by the League of Nations."

On the basis of these facts, the Court concluded that the Nicaraguan Declaration of 1929 accepting the compulsory jurisdiction of the Permanent Court unconditionally "was not subject to ratification" and "was undoubtedly valid from the moment it was received" (para. 25); and that it remained "valid at the moment when Nicaragua became a party to the Statute of the new Court" (para. 27).

This conclusion was reached even though the failure of Nicaragua to deposit its ratification of the Protocol of Signature of the Statute of the Permanent Court meant that Nicaragua "was not a party to that treaty," and, consequently, that the 1929 Declaration "had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice might produce" (para. 26).

Noting (para. 35) "that Nicaragua was represented at the San Francisco Conference, and duly signed and ratified the Charter of the United Nations" (of which the Statute of the International Court of Justice "forms an integral part"), the Court concluded that Article 36, paragraph 5, providing for the transfer to the new Court of declarations accepting the compulsory jurisdiction of the old Court which were "still in force" or made "*pour une durée qui n'est pas encore expirée*," was effective to include valid declarations, even if they had not previously acquired binding force (para. 31).

This conclusion—reached after careful consideration of the contrary views expressed by the United States (and, of course, the views of dissenting judges)—was based in part upon the subsequent conduct of the parties to the Court's Statute (para. 42), and the inclusion over a period of almost 40 years by "international organs empowered to handle such declarations" of Nicaragua in the lists of states accepting the compulsory jurisdiction of the Court (para. 47).

The failure of Nicaragua to accomplish the "formality" of depositing its ratification was thus, in the opinion of the Court, balanced by "the constant acquiescence" of Nicaragua, which constituted "a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute," independently of the interpretation and effect of paragraph 5 of that article (paras. 42, 47, 109, 110).

The Court therefore found that Nicaragua had accepted the compulsory jurisdiction of the Court and turned to the question whether the United States had accepted "the same obligation."

II. ADMISSIBILITY

Some of the more far-out arguments of the United States were advanced as objections to the admissibility of the Nicaraguan Application of April

9, 1984. Although they were set forth as objections to admissibility—or, as the United States claimed, “as a legal bar to adjudication,” or as calling for judicial discretion “in the interest of the integrity of the judicial function”—the Court noted that some of the objections were presented in terms of jurisdiction rather than of admissibility (para. 84).

Five separate grounds of inadmissibility were developed before the Court, each allegedly sufficient in itself to bar the case brought by Nicaragua charging the United States with use of force and intervention in violation of international law.

One is not surprised that, after full consideration, the Court, by the unanimous vote of 16 judges, rejected all pleas to admissibility as without merit.

(1) The plea that Nicaragua had failed to bring before the Court “indispensable parties”—allegedly, Honduras, Costa Rica and El Salvador—was rejected both on the merits (Nicaragua was claiming against the United States alone) and on principle: no such rule as was contended for, under which a third state could be directed by the Court to be made a party to proceedings, existed in the Statute or in the practice of international tribunals (para. 88). This argument had already been rejected by the Court in its Order of May 10, 1984, indicating provisional measures in this case.

(2) The plea that the dispute brought by Nicaragua was essentially within the competence of the United Nations Security Council, not the Court, was rejected because the Court and the Security Council have separate functions, even where related to the same events: the United States was attempting “to transfer municipal law concepts of separation of powers to the international plane” (para. 92).

(3) The plea that the concept of “collective self-defence” could not appropriately be subjected to judicial examination in the midst of the conflict was met by the reminder that the “factual allegations made against Nicaragua by the United States, even if true, fall short of an ‘armed’ attack within the meaning of Article 51” of the Charter, which also “requires that actions under it ‘must be immediately reported to the Security Council’—and no such report has been made” (para. 92). The fact that self-defense “is referred to in the Charter as a ‘right’ is indicative of a legal dimension” (para. 98).

(4) The plea of the inability of the judicial function to deal with situations involving ongoing conflict was dismissed with the observations “that any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law” (para. 101), and that the Court “cannot at this stage rule out *a priori* any judicial contribution to the settlement of the dispute by declaring the Application inadmissible” (*id.*).

(5) Rejecting a fifth plea of inadmissibility, the Court observed: “the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising

the Court" or that the Contadora process constitutes in this case an obstacle to examining Nicaragua's Application (para. 108).

III. DECLARATIONS—TIME LIMITS—RECIPROCITY

Since it is unlikely that a dispute such as that over Nicaragua's failure to deposit its ratification will ever arise before the Court again, and since the pleas to admissibility were so easily exposed as not warranting future repetition, it may well be that the more significant findings of the Court are its treatment of the terminability or modification of declarations accepting its compulsory jurisdiction, and the role of reciprocity in relation to reservations thereto.

For many years, the Permanent Court and the International Court of Justice have held that the provisions of Article 36, paragraph 2 of the Statute that states may make declarations recognizing the compulsory jurisdiction of the Court "in relation to any other State accepting the same obligation" establish a "condition of reciprocity" with regard to reservations contained in such declarations.²

In summary form, it has been established that since reciprocity is a jurisdictional requirement of Article 36, paragraph 2 of the Statute, it applies even to declarations made without reservation of reciprocity; that the principal legal consequence of the condition of reciprocity is that the parties are placed on a footing of equality while before the Court; that the words "accepting the same obligation" require neither identically phrased declarations nor equivalent reservations; that the Court's jurisdiction in a particular case is based upon and limited by the common ground on which the parties accept its jurisdiction—which in practice means that jurisdiction is limited by the declaration that accepts jurisdiction within narrower limits.³

Moreover, the critical date for establishing whether two declarations coincide in conferring jurisdiction and determining the common ground is the date the application is filed with the Court; "the same obligation" is therefore not irrevocably fixed at the time when declarations are deposited.⁴

Despite the clarity with which the Court had set forth these conclusions, counsel for the United States chose to challenge some of them—even going to the length of resurrecting reciprocity arguments that had been rejected by the Court in the *Interhandel* and *Right of Passage* cases.

On April 6, 1984—hearing that Nicaragua was about to bring suit

² Since space is not available here to analyze this jurisprudence, I venture to cite my 1958 lectures before the Hague Academy of International Law, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 RECUEIL DES COURS 223 (1958 I), particularly the chapters on reciprocity, time limits and the opinions of the Court, where full citations are given.

³ *Id.* at 267.

⁴ *Cf.* Case concerning Right of Passage over Indian Territory (Port. v. India) (Preliminary Objections), 1957 ICJ REP. 125, 143-44 (Judgment of Nov. 26), and quoted in the Court's current opinion, para. 64.

against it before the Court—the United States hastily deposited with the Secretariat of the United Nations what became known as the “Shultz” or “1984 notification,” purporting to exclude, with immediate effect, from its standing acceptance of the compulsory jurisdiction of the Court “disputes with any Central American State” for 2 years.

Despite the fact that the 1946 Declaration of the United States contained no such reservation and was expressed to be terminable subject to 6 months’ notice, the United States contended that it had the right to modify or terminate such a declaration on notice—mainly on the “reciprocity” argument that many other states claimed such a right and it would be unfair to hold a state to its self-chosen words.

More specifically, the United States contended, as summarized by the Court:

(1) that “States have a sovereign, inherent, extra-statutory right to modify at any time declarations made under Article 36 of the Statute in any manner not inconsistent with the Statute” (para. 55);

(2) that such declarations “are *sui generis*, are not treaties, and are not governed by the law of treaties” (para. 53);

(3) that the Nicaraguan Declaration of 1929—although unconditional and of indefinite duration—was nevertheless “subject to a right of immediate termination, without previous notice by Nicaragua” (para. 55); and

(4) that the United States was therefore entitled, on the basis of reciprocity, to benefit from this termination provision, which was not to be found in Nicaragua’s Declaration (paras. 55 *ff.*).

The fallacy that the condition of reciprocity, which applies to the content of declarations and reservations thereto, also applies to their time limits may be traced in part to my lamented friend, Sir Humphrey Waldock, although the Court rejected his arguments to that effect on behalf of India in the *Right of Passage* case.⁵ What the argument overlooks is the Court’s clear holdings that the statutory “condition of reciprocity” does not and never has applied to the time limits which states insert in their declarations.

The current Judgment is explicit on the point and clears the air:

The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State’s own declaration, whatever its scope, limitations or conditions [para. 62, quoting the *Interhandel Case* (Switz. v. U.S.), 1959 ICJ Reports 6, 23 (Judgment of Mar. 21)].

⁵ See Waldock, *Decline of the Optional Clause*, 32 BRIT. Y.B. INT’L L. 244 (1955–56), from which dissenting judges freely quote in the current case. See also Briggs, *supra* note 2, at 258 *ff.*, 261, 276–78, including citations.

Reaffirming the point already made in the *Right of Passage* case (1957 ICJ Reports 143, 144), that the critical date for the establishment of "the same obligation" is "the moment of the filing of an application," the Court added: "the possibility that, prior to that moment, the one enjoyed a wider right to modify its obligation than did the other, is without incidence on the question" (para. 64).

Finally, the Court was of the opinion:

(1) that "the right of immediate termination of declarations with indefinite duration is far from established" (para. 63);

(2) that, in any case, the United States "by its own choice" and "formally and solemnly" had assumed "an inescapable obligation" not to change its 1946 Declaration except upon 6 months' notice (para. 61); and

(3) that unilateral declarations are subject to the requirements of good faith and "should be treated, by analogy, according to the law of treaties" (paras. 60-63).

The Court therefore rejected the attempted evasion by the United States of the obligation voluntarily assumed in 1946 and found that both Nicaragua and the United States had accepted "the same obligation" of compulsory jurisdiction.

The Court was correct in holding further (paras. 67-76) that the Vandenberg multilateral treaty reservation was no bar *in limine litis* to consideration of Nicaragua's claims, but it appears unfortunate that the Court dismissed it as not exclusively of a preliminary character rather than holding, for example, that it is not the function of the Court to make sense out of a reservation that by its terms is nonsensical. A reservation requiring that "all Parties to the treaty affected by the decision are also Parties to the case before the Court" would be destructive of the international judicial process if every party to the Statute (a multilateral treaty) had to be a party to every and any case involving the interpretation or application of that Statute. Such a reservation is not consistent with the Statute.

* * * *

In conclusion, one may take great satisfaction in a Judgment in which patient and careful legal analysis of the varied arguments presented resulted in upholding legal obligations voluntarily assumed.

For the future, if the United States is prepared—as it always claims—to have its international behavior judged by standards of law and justice, the 1946 Declaration accepting the compulsory jurisdiction of the Court—but, of course, minus the Connally and Vandenberg reservations—would serve it well.

HERBERT W. BRIGGS

ICY DAY AT THE ICJ

"The Court's decision of November 26, 1984, finding that it has jurisdiction [in the case brought by Nicaragua against the United States], is contrary to law and fact. With great reluctance, the United States has decided not to participate in further proceedings in this case."¹ With that, the U.S. Government turned its back not only on the International Court of Justice but on 40 years of leadership in the cause of world peace through law.

It cannot have been an easy decision. Those in Washington who took it must have known that it would be costly to the national interest, in both the long run and the short term. In the long run, it deprives the United States of whatever moral superiority accrues from a continued commitment to restraint based on neutral reciprocal principles in a world of rampant opportunistic self-aggrandizement. In the short term, the decision not to participate in the "merits" phase of the case will also be seen by many as confirmation that the United States is guilty as charged by Nicaragua.

In announcing its decision, the State Department argued that "much of the evidence that would establish Nicaragua's aggression against its neighbors is of a highly sensitive intelligence character. We will not risk U.S. national security by presenting such sensitive material in public or before a Court that includes two judges from Warsaw Pact nations."² Yet those who drafted this statement undoubtedly realized that it would be greeted by nearly universal skepticism. The State Department itself has engaged in detailed public recitations of unclassified evidence to support its contention that its covert retaliation against Nicaragua is an exercise, with Honduras and El Salvador, of the right of collective self-defense. It is not really credible that a 4-year-long effort at large-scale training, supply and direction of Salvadoran insurgents by Nicaragua and Cuba would have remained entirely invisible except to highly classified sensors. Most observers, even those of pro-American leanings, will reluctantly group this explanation with the too familiar use by national governments of the "national security" rationale to withhold evidence of their own wrongdoing. In this they may be wrong, but their response will be both human and predictable.

Given these almost inescapable long- and short-run costs, why was withdrawal considered the only acceptable option open to the U.S. Government? Careful reading of the U.S. statement suggests that Washington's decision was based on two conclusions. The first is that the Court's decisions in the proceedings to date are so blatantly biased as to foreclose the possibility of a fair hearing on the merits. The Government's statement asserts unequivocally that the decision of November 26 "is erroneous as a matter of law and is based on a misreading and distortion of the evidence and precedent."³ Ambassador Jeane Kirkpatrick earlier

¹ U.S. Dep't of State, Statement: U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, undated, at 1 (mimeo.).

² *Id.* at 3.

³ *Id.* at 2.

hinted at this conclusion when, at the 1984 Annual Meeting of the American Society of International Law, she noted that the judges of the ICJ are elected by the very same political process that generates the resolutions of the United Nations.

The second conclusion follows from the first: that the time has come to undertake a basic rethinking of U.S. relations with the Court and, indeed, all multilateral institutions of world order. "We have seen in the United Nations, in the last decade or more," the U.S. statement on withdrawal continues, "how international organizations have become more and more politicized against the interests of the Western democracies."⁴ Those developments "compel us to clarify our 1946 acceptance of the Court's jurisdiction."⁵ And, for that matter, our membership in most multilateral institutions. The United States travels more surely and swiftly, the Reagan administration now appears to believe, when it travels alone.

In a recent statement, Allan Gerson, the acting counselor for legal affairs to the U.S. Mission to the United Nations, noted that the Nicaraguan suit really did not turn on a question of law—the right of collective self-defense is well established by Article 51 of the UN Charter and in customary international law—but on complex facts: is there a Nicaraguan "attack" to which U.S. actions are part of a collective response? "Do we," he asked, "really want the World Court to be in a position to second guess the House Committee on Intelligence, the Senate Committee on Intelligence, the Bipartisan Commissions established for that purpose?" To his own question, the counselor gave an emphatic no, because, by submitting to the Court, we would risk a negative decision, in which case "U.S. freedom of action in the region will be impaired." Moreover, even if we were to win, he argued, the United States would gain nothing except to serve as a "good example" to other states. "But does it make sense," he continued,

for the United States to agree to a fact-finding reviewing role by the Court, in matters of U.S. national security, at a time when we have no reasonable assurances that our posture will contribute to inducing other states to take similar risks, and indeed when all available evidence points in the other direction? That the process of setting a good example does not yield results—not, at least, in terms of getting others to follow our example in accepting the compulsory jurisdiction of the Court—is empirically verifiable.⁶

In walking away from the Court, the United States thus expresses despair with its politicized, anti-Western bias, as revealed by its preliminary decisions in the Nicaraguan case, and with multilateral institutions and the neutral reciprocal principles by which they were intended to operate. Why should we be the last ones to play by the rules, the Reagan administration

⁴ *Id.*

⁵ *Id.* at 4.

⁶ Lecture by Allan Gerson, "Should the U.S. Rethink its Attitude toward the World Court? Implications of the Dispute with Nicaragua on American Foreign Policy," John Bassett Moore Society of International Law, University of Virginia School of Law (Nov. 17, 1984, mimeo.).

seems to be asking, long after they have been abandoned by everyone else? Moreover, why should a superpower, in matters of essential national interest, ever subordinate its power of initiation to a system that it does not control and that may even be controlled by our enemies?

These are fundamental questions. They are not new, of course. Senator Borah, in joining to frustrate U.S. adherence to the PCIJ in 1935 said, "I am not in favor of an international judicial tribunal, so called, which is political and advisory in character."⁷ That the questions are now asked again creates a fundamental challenge to the basic assumptions held for 40 years by American international lawyers, in particular, and shared by most of the nation's foreign policy establishment. It's a dog-eat-dog world out there, we are being told, so let's stop acting as if it were otherwise.

Whatever the merits of this reality-testing challenge, when directed towards UNESCO or the UN General Assembly, it seems exaggeratedly alarmist, to the point of paranoia, when addressed to the ICJ. This is, after all, the same Court that, despite its socialist and Third World membership, overwhelmingly endorsed the U.S. complaint against Iran during the hostage crisis in 1980. Does the Court's conduct to date in respect of the Nicaraguan complaint provide clear-cut evidence that it has now been politicized by America's enemies?

In its Order of the Court of May 10, 1984, the ICJ directed certain provisional measures to the parties and to other states in the region and the world. However, by specifically naming the United States while referring to Nicaragua only anonymously, the Court left itself open to the suspicion that its unexceptionable injunction against the illegal use of force by any party incidentally demonstrated a bias against one of the parties. It was an unfortunate beginning to a case in which the Court should have gone out of its way to demonstrate its unimpeachable impartiality. Equally unfortunate was the Court's Order of October 4, 1984, which decided not even to hear El Salvador's oral argument on behalf of its Declaration asking to be allowed to intervene in the proceedings on the question of jurisdiction and admissibility under Article 63 of the Statute. While the Court, both at the time and in its opinion of November 26, 1984, reiterated the possibility of El Salvador's intervening at the merits stage of the proceedings, this curt treatment further reinforced the suspicion in Washington that the majority of judges had already made up their minds and would brook no delay in reaching their preconceived decision. Once again, by refusing to bend over backwards to give the utmost consideration to the respondent's side, the Court seemed to bow in the direction of the plaintiff.

Nevertheless, the United States continued to participate in the Court's proceedings. This took considerable courage on the part of the State Department's Legal Adviser, since there were already voices within the administration arguing for abandonment of the Court. No doubt that courage was reenforced by a certainty that the United States had the law entirely on its side in the matter of jurisdiction and admissibility. When a

⁷ 79 CONG. REC. 702 (1935).

sizable majority of the Court voted otherwise, Washington's suspicion of judicial bias became a vested conviction.

Is the conviction justified? The issues before the Court, at this stage, were numerous and complex. Nevertheless, the four most important findings of the Court should now be examined by every American international lawyer as if he or she were engaging in a form of judicial review, for it is now the Court itself that has been placed on trial by the U.S. Government. The appropriate standard for such review is the same as might be fashioned by any appellate tribunal: Are the findings of the ICJ so patently unreasonable—in another section of this issue, Monroe Leigh calls one “preposterous”—as to permit no other conclusion than that they reflect the willful anti-American bias of the judges?

The Court's first finding is that Nicaragua has accepted the ICJ's compulsory jurisdiction. The United States had demonstrated that Nicaragua, while having formally declared its intent to accept the optional compulsory jurisdiction of the predecessor Permanent Court of International Justice, had nevertheless failed—deliberately or not—to ratify that Court's Protocol. The United States had argued that this technical noncompliance entitled it, reciprocally, to refuse to be sued by Nicaragua despite Washington's conditional acceptance of the Court's optional clause (Article 36 of the ICJ Statute). To reach its conclusion, the majority of judges (by 11 to 5) held that the defect in the Nicaraguan acceptance of the PCIJ's compulsory jurisdiction had been cured, in part by the wording of the provision in Article 36(5) of the ICJ's Statute by which the new Court inherited the jurisdiction of the old.⁸ It further held that the conduct of the ICJ Registry, the UN Secretary-General and Nicaragua itself evinced an intent that Nicaragua be seen to be bound by operation of Article 36(5) of the Statute.⁹ These deductions are certainly arguable and a reader may well conclude that the dissents of Judges Oda and Schwebel on these points make more convincing deductions from the ambiguous historical evidence.¹⁰ The Court's treatment of the estoppel argument is particularly thin.¹¹ Still, it would be hard for a fair-minded reader of the majority's reasoned opinion to conclude that this result could not be reached by a dedicated and impartial judge. Indeed, it would have been more surprising if the Court had refused to take jurisdiction on the basis of Nicaragua's technical failure, in 1939, to follow up its telegraphed notice of ratification with an actual delivery of the instrument, particularly since, after 1945, separate ratification of the new Court's constitutive instrument became unnecessary, it being subsumed in ratification of the UN Charter by operation of Article 93.

The Court's second major finding is that the United States is also bound by its 1946 acceptance, with reservations, of the compulsory jurisdiction of the ICJ under Article 36(2). In reaching this conclusion,

⁸ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 403–08 (Judgment of Nov. 26).

⁹ *Id.* at 408–10.

¹⁰ *Id.* at 569–94.

¹¹ *Id.* at 414–15.

the Court held that the United States was obliged to act in accordance with its self-imposed requirement of 6-months' notice for termination set forth in the U.S. acceptance of the Court's compulsory jurisdiction. It rejected the notion that the "1984 notification" merely suspended, rather than selectively terminated, U.S. adherence under Article 36(2) of the Statute. It also rejected the U.S. contention that, since Nicaragua had imposed no such 6-month notice period on itself, the principle of reciprocity should release the U.S. from that obligation. Instead, the majority thought that Nicaragua's acceptance was subject to an implicit requirement of "reasonable" notice, but that, in any event, such self-imposed procedural requirements are not subject to the reciprocity concept.¹² Even if they were, a reciprocal "reasonable notice" test would not have been satisfied by U.S. conduct. Once again, the Court's conclusions, whether one agrees with them or not, cannot be dismissed as mere window dressing for a hanging party. The last-minute effort by Washington to escape from the Court's jurisdiction, once it learned that Nicaragua was about to start a lawsuit, may be explicable in terms of leaving no legal stone unturned, but it was a dodge that could not reasonably have been expected to appeal to a majority of the judges, particularly in view of the rather ostentatiously self-imposed 6-month notice requirement which sought to demonstrate U.S. resolve never to employ so unworthy an evasion.

A third major holding of the Court, and one that is backed by all but two judges, is that the Court has mandatory jurisdiction under the terms of Article 24(2) of the U.S.-Nicaraguan Treaty of Friendship, Commerce and Navigation of 1956.¹³ This provides: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means." Article 19 provides for "freedom of commerce and navigation" and other articles (1, 14, 17, and 20) mandate friendly and equitable relations. The history of this and comparable treaties can be, and was, used to argue convincingly that these provisions were intended to deal with commercial relations and not with armed hostilities.¹⁴ It cannot, however, be maintained that a reasonable judge—Sir Robert Jennings, for example—could not have decided that the language of the Treaty patently applied, regardless of what the parties may have contemplated at the time it was concluded, and that the actual meaning of the Treaty in this dispute could only be determined at the merits stage of the proceedings.

Finally, the Court rejected the notion that this is the sort of dispute which, because it involves ongoing hostilities and complex facts, is beyond its competence.¹⁵ What else could 16 jurists at the ostensible pinnacle of the international legal system have been expected to say? Previously, it was the Soviet judge who could be counted upon to urge that, faced with a hot political issue such as the appropriate *Conditions for Admission to*

¹² *Id.* at 415–21.

¹⁴ *Id.* at 631–37.

¹³ *Id.* at 427–29.

¹⁵ *Id.* at 432–41.

Membership in the United Nations or the mandatory allocation of *Certain Expenses of the United Nations*, the Court could do the parties no good and itself much harm if it did not stay out of it. Soviet Judges Krylov and Koretsky may have been more sensible than we then recognized, but neither then nor now is it to be expected that a majority of judges would agree to circumscribe their powers so radically.

These four issues do not exhaust the matters considered in the November 26 decision. No part of that decision, however, appears to this American international lawyer to be insupportable in law and thus, evidently, a manifestation of "politicization." It is a decision as to which reasonable men and women versed in the law can and will differ.

That brings us to the second conclusion that appears to underlie the administration's decision to walk away from the Court: that the U.S. interest is better protected when the nation relies on its own power than when it is submerged in a multilateral system which it cannot control, and to which we adhere solely in the quixotic hope, Mr. Gerson says, of setting a good example.

That, of course, was not the view in Washington when a virtually unanimous ICJ backed us against Iran. The Court deserves some credit for helping to generate the diplomatic climate in which Iran felt impelled to release the hostages and, incidentally, to submit the rival monetary claims of the United States and Iran to another system of international adjudication. The unilateral use of U.S. power had failed utterly to achieve that desired result.

Surely, the point is that self-reliance and submission to law are not alternatives, but eminently compatible components of a superpower's strategy, at least for as long as it proposes to be law-abiding. The United States does not adhere to the Court primarily to "set a good example," but, rather, because, as a richly endowed but not omnipotent member of the international community, it tends—as a matter both of principle and of self-interest—to conduct itself in accordance with those neutral reciprocal principles to which it has voluntarily committed itself. When others fail to live up to those commitments, it is useful to be able to demonstrate this, credibly, in open court. *That* is why we joined, and that is why we should not have walked away.

THOMAS M. FRANCK*

* The author participated in the preparation of El Salvador's Declaration seeking to intervene as of right on the questions of jurisdiction and admissibility.

MODIFYING U.S. ACCEPTANCE OF THE COMPULSORY JURISDICTION OF THE WORLD COURT

There is little doubt, in the wake of the decision of the International Court of Justice on jurisdiction in *Nicaragua v. United States*,¹ that the U.S. Government will modify its 1946 Declaration accepting the compulsory jurisdiction of the Court under the "optional clause."² There will probably be rash calls for the United States to withdraw completely from the optional clause. This paper proposes, first, several modifications of the U.S. Declaration that arguably serve the national as well as the international interest. Second, several other proposals for change are examined and found arguably to be contrary to the national interest. Finally, two broader questions are briefly considered that are necessarily implicated by the issue of modifying the U.S. Declaration: whether the rules of international law as a whole are in the national interest, and whether the existence of the World Court as a forum for discerning and applying those rules is consonant with the U.S. national interest over the long run. Naturally, there is no expectation that the brief treatment here of these latter questions can do anything more than begin to suggest possible contours of inquiry.

¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26) [hereinafter cited as *Nicaragua*].

² The optional clause is contained in Article 36(2) of the Court's Statute. The U.S. Declaration of Aug. 14, 1946 provides in pertinent part that the United States

recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to

- (a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
- (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
- (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1982, at 23-24, UN Doc. ST/LEG/SER.E/2 (1983) [hereinafter cited as MULTILATERAL TREATIES].

I. DESIRABLE MODIFICATIONS OF THE U.S. DECLARATION

It is misleading to think of compulsory jurisdiction primarily in terms of defending against possible lawsuits. A declaration accepting the World Court's compulsory jurisdiction is as much an offensive weapon against the international legal delicts of other states as it is a defensive weapon; it is a sword as well as a shield. *Nicaragua v. United States* should not loom so large in current thinking as to downplay the offensive potential of the Court's jurisdiction for the United States. Because of the principle of reciprocity, any substantive exception from compulsory jurisdiction will reduce opportunities to use the Court offensively against other states; hence, in theory, the defensive benefit of any exception is counterbalanced by an equivalent offensive cost.

In fact, for two reasons the costs may exceed the benefits. First, in accordance with the evolution of its jurisprudence, the Court will construe a substantive exception from compulsory jurisdiction more broadly *against* its proponent when its proponent acts offensively than when it is part of its proponent's defense to a lawsuit. Any substantive exception will inherently buy its proponent less protection under its terms than will be provided, through reciprocity, to its opponent. How and why this happens with regard to specific provisions will be indicated below as we examine possible substantive exceptions to compulsory jurisdiction; here it is important to note simply that the phenomenon occurs.

Second, in the years ahead, the number of instances in which the United States will want to use the compulsory jurisdiction of the World Court offensively will probably exceed potential defensive uses. We may expect that other nations will violate international law more often, to the detriment of U.S. interests, than the United States will allegedly violate that law. To be sure, on a subjective level, every state can say the same; every state professes to act legally on the international plane, and every state believes it is the victim of the illegal acts of some of the other states. To the extent that any state truly believes this, that state should join the compulsory jurisdiction of the World Court. (The steadfast refusal of the Soviet Union to accept the compulsory jurisdiction of the Court is an ever present reminder that the USSR accepts the likelihood that it will more frequently be considered guilty of transgressions of international law than its opponents.) But even on an objective level, the fact that the U.S. Constitution is broadly coincident with evolving standards of rights under international law will mean that in years to come, U.S. citizens and corporations will probably receive treatment in other countries that violates international legal standards much more often than foreign citizens and corporations will allege having received substandard international treatment in the United States. In a world where nuclear weaponry has made the use of transboundary coercive force dangerous and exceptional, the United States may thus increasingly find itself resorting to the World Court, as it successfully did in the *Iranian Hostages* case,³ to protect the

³ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24). In his closing statement to the Court in support of the U.S.

legitimate interests of its citizens and corporations abroad. For all the preceding reasons, any exception to the compulsory jurisdiction of the Court should at least be scrutinized carefully, and the burden of justification should be upon the proponent of such an exception.

The Sitting Duck Problem

One remediable problem with the U.S. Declaration at present is that it encourages other nations that might want to sue the United States not to make similar declarations accepting compulsory jurisdiction. For example, suppose state A, which has not accepted the World Court's compulsory jurisdiction, contemplates bringing suit against the United States in the Court. There is no need for state A to have accepted the optional clause because A can file its declaration under the optional clause a day or two before instituting its suit.⁴ Thus, as long as A has not accepted the Court's compulsory jurisdiction, it cannot be sued by the United States, but if it wants to sue the United States, it simply files its acceptance just before filing the suit. Consequently, the United States is a "sitting duck" for the offensive actions of other states but—as to those states that do not have standing acceptances of compulsory jurisdiction—has no offensive capability of its own.

The problem can be remedied by adding a *proviso* to the U.S. Declaration similar to the British exception,⁵ which excludes from jurisdiction those states that have deposited or ratified their acceptance of the Court's compulsory jurisdiction less than 12 months prior to filing their lawsuit.⁶ Not only will this protect the United States, but it will also serve the

Application for Provisional Measures, Roberts B. Owen, the State Department's Legal Adviser, said: "We believe that this case presents the Court with the most dramatic opportunity it has ever had to affirm the rule of law among nations and thus fulfill the world community's expectation that the Court will act vigorously in the interest of international law and international peace." ICJ Public Sitting, Dec. 10, 1979, Verbatim Record (uncorrected) 44 (Doc. CR 79/1, 1979), cited in Gross, *The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AJIL 395, 397 (1980). Clearly an important function of the World Court is to provide a forum where a nation may state its complete legal position. In the *Iranian Hostages* case, "mobilizing the world community by means of the one agency of the world community most likely to speak for it in an unambiguous and authoritative way was one of the Government's objectives." Gordon & Youngblood, *The Role of the International Court in the Hostages Crisis—A Rejoinder*, 13 CONN. L. REV. 429, 435 (1981).

⁴ Portugal filed its Declaration accepting the Court's compulsory jurisdiction on Dec. 19, 1955, MULTILATERAL TREATIES, *supra* note 2, at 21, and 3 days later (before India was even notified of it) sued India. Case concerning Right of Passage over Indian Territory (Port. v. India) (Preliminary Objections), 1957 ICJ REP. 125, 132 (Judgment of Nov. 26).

⁵ The Declaration of the United Kingdom of Great Britain and Northern Ireland, of Jan. 1, 1969, MULTILATERAL TREATIES, *supra* note 2, at 23, excludes disputes where the other party's deposit or ratification of acceptance of compulsory jurisdiction occurred "less than twelve months prior to the filing of the application bringing the dispute before the Court."

⁶ For a good early discussion, see Bleicher, *ICJ Jurisdiction: Some New Considerations and a Proposed American Declaration*, 6 COLUM. J. TRANSNAT'L L. 61, 74-75, 79-85 (1967).

international interest in gaining general acceptance of the Court's compulsory jurisdiction by encouraging states such as state *A* to file their declarations well in advance of a given dispute.

The Single-Shot Problem

The sitting duck problem raises a related issue: that of limiting acceptance of compulsory jurisdiction, albeit 12 months in advance of a dispute, to a subject on which offensive litigation is contemplated. For example, suppose state *B*, anticipating that it may want to sue the United States with regard to mineral claims in Antarctica, files an acceptance of the Court's compulsory jurisdiction limited to "disputes involving or regarding Antarctica."⁷ Twelve months later, state *B* sues the United States without ever having exposed itself to general litigation by the United States or other states. The British Declaration seems to address such a problem by excepting "disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute."⁸ But this language, or even appropriately modified language, probably will not suffice to achieve its purpose. For example, would it exclude the Antarctica hypothetical? Twelve months after the fact, the United States might have a hard time proving that state *B* had accepted jurisdiction for questions relating to Antarctica to enable it to file that particular suit later. If nothing else, *Nicaragua v. United States* is a warning that vague language in declarations of acceptance of jurisdiction may meet with unsympathetic interpretation by the Court.

Additionally, subject-matter limitations to declarations of acceptance of jurisdiction should be welcomed as at least partial steps along the road to general acceptance. An Antarctica-question limitation, for instance, is not per se objectionable. Thus, it would probably be unwise to attempt to defeat all such subject-matter limitations in advance by such vague formulas as that of the British exception, "in relation to or for the purpose of the dispute."

Instead, the remedy for the United States in such a case is not an additional exception to its Declaration, but rather an alertness on the part of the Government to react within 6 months to limited acceptances of compulsory jurisdiction. Thus, if state *B*, 12 months before filing suit against the United States accepts the compulsory jurisdiction of the World Court only for questions regarding Antarctica, the United States could modify its own Declaration within the next 6 months to take state *B*'s possible tactics into account. (Under its present Declaration, the United States can terminate the Declaration by giving 6 months' notice.) For example, the United States could amend its Declaration to exclude disputes on questions relating to Antarctica if the other party to the dispute has limited its acceptance of jurisdiction to such questions. Perhaps the United

⁷ The present Egyptian Declaration is limited to legal disputes involving the Suez Canal.

⁸ Declaration of the United Kingdom of Great Britain and Northern Ireland, *supra* note 5.

States might decide, in the actual instance, not to do this; perhaps it might conclude that a case limited to Antarctica brought by state *B* would be welcome as a way to resolve legal questions vis-à-vis state *B*. Such an option would be retained by the strategy here indicated.

The Hit-and-Run Problem

Suppose state *C* sues the United States in the World Court, and then a day or two after filing suit, withdraws its acceptance of compulsory jurisdiction. This hit-and-run tactic is objectionable from the U.S. standpoint, although it is perhaps not a serious problem in any event. For one thing, any counterclaim the United States may want to make against state *C* arising out of the litigation instituted by *C* is permissible even after *C* has withdrawn its acceptance of jurisdiction.⁹ However, *C*'s withdrawal may well serve to insulate it from related claims of other states. For example, when state *C* sues the United States, its legal theory in the litigation may suggest a similar claim that could be asserted against *C*. State *C*'s withdrawal would bar the lawsuit by *D*, perhaps to the tactical disadvantage of the United States in its litigation strategy.

At this point, one may wonder whether the present 6-month notice provision in the U.S. Declaration will automatically serve as a matter of reciprocity to require that *C* must not terminate its own declaration in less than 6 months. In *Nicaragua v. United States*, the Court answered in the negative, holding that the "notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction."¹⁰

A possible way around this problem is suggested by analogy to the "sitting duck" problem previously discussed. There a condition precedent

⁹ Nottebohm case (Liechtenstein v. Guat.) (Preliminary Objection), 1953 ICJ REP. 111, 123 (Judgment of Nov. 18).

¹⁰ *Nicaragua*, para. 62. To be sure, this holding is somewhat complicated by the fact that the United States in that case claimed that Nicaragua's Declaration, which did not specify its duration, was capable of immediate termination without notice, and hence that, reciprocally, the U.S. 6-month notice provision should not apply against Nicaragua; rather, on the principle of reciprocity, the United States arguably should be able to terminate its own Declaration vis-à-vis Nicaragua immediately and without notice. Part of the trouble with this argument was the fact that the Nicaraguan Declaration contained no language that the United States could use and cite; immediate terminability was not something that Nicaragua had expressly included in its own Declaration. But this would be a slender distinction for the United States to count on in the future against a nation, like Canada, that provides for immediate termination upon notice to the United Nations. (The Declaration of Canada of Apr. 7, 1970, MULTILATERAL TREATIES, *supra* note 2, at 13, provides that the Canadian Government "reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added.") In that case, the Court is more likely to elevate the sentence just quoted in the text into an unshakable rule, excluding from the operation of reciprocity matters relating to the formal conditions of the duration or modification of declarations of acceptance of jurisdiction.

(of a 12-month acceptance of jurisdiction by the other party) was expressly included as part of the proposed declaration of acceptance. Here a condition subsequent could be included, providing for the defeat of jurisdiction if the plaintiff state withdraws (or modifies) its declaration within 6 months after filing its suit. Yet it is quite possible that the Court would refuse to give effect to such a condition subsequent, on the ground that the Court, once seised of a case, cannot have its jurisdiction vitiated by a subsequent event.¹¹

To avoid that adverse possibility, the United States might consider conditioning its acceptance of compulsory jurisdiction on the presence of at least a 6-month notice-of-withdrawal provision in the declaration of the plaintiff state. Yet such a condition could turn out to be draconian in its effect. Since at least 11 states currently accept compulsory jurisdiction with no provision as to termination,¹² and at least 25 other states currently accept compulsory jurisdiction with undefined duration but with the right to terminate upon notice,¹³ the effect of such a modification would be to remove all of these states from the possibility of being sued by (or suing) the United States.¹⁴ Since states are notoriously slow to modify their World Court declarations, the negative impact of these disabilities upon the Court's jurisdiction might be long-lasting.

It appears, therefore, that every solution to the hit-and-run problem is a cure that is worse than the disease. Perhaps the problem is not significant enough to warrant any tampering with the U.S. Declaration. Yet there does seem to be an undesirable imbalance between the 11 states including the United States that have accepted at least a 6-month notice for termination, and the 36 other states that have accepted the compulsory jurisdiction of the Court without explicitly limiting themselves as to modification or termination of their declarations. This imbalance has real "bite" not with respect to the hit-and-run problem, however, but with respect to the problem of running away from compulsory jurisdiction when faced with a threatened lawsuit. Let us therefore postpone the question of remedy until this latter problem is presented in the next subsection.

The Last-Minute Withdrawal Problem

The Senate Committee on Foreign Relations, reporting favorably on the U.S. Declaration of 1946 accepting the compulsory jurisdiction of the World Court, noted that the 6-month period of notice before termination

¹¹ See note 9 *supra*.

¹² Colombia, the Dominican Republic, Egypt, Gambia, Haiti, Honduras, Nicaragua, Nigeria, Panama, Uganda and Uruguay.

¹³ Australia, Austria, Barbados, Belgium, Botswana, Canada, Costa Rica, Kampuchea, El Salvador, India, Israel, Japan, Kenya, Liberia, Malawi, Malta, Mauritius, Pakistan, the Philippines, Portugal, Somalia, Sudan, Swaziland, Togo and the United Kingdom.

¹⁴ Only ten states would be left, those which, like the United States, have a notice-of-withdrawal provision of 6 months or longer. They are Denmark, Finland, Liechtenstein, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Sweden and Switzerland.

of that acceptance "has the effect of a renunciation of any 'intention to withdraw our obligation in the face of a threatened legal proceeding.'" ¹⁵ Thus the United States cannot withdraw its acceptance of compulsory jurisdiction within 6 months before a threatened lawsuit against it is filed, as indeed the Court confirmed in *Nicaragua v. United States* by 13 to 3. ¹⁶ But if the United States wants to sue any of the 36 states that do not have a 6-month or longer notice provision in their acceptance of compulsory jurisdiction, are those states not free to withdraw at the last minute from the threatened legal proceeding?

The Court will infer some reasonable period of time from those declarations which do not specify a notice period for withdrawals. In *Nicaragua v. United States*, the Court held that a 3-day period would not amount to a reasonable time, drawing upon an analogy to the law of treaties, which requires a reasonable time for withdrawal from treaties that contain no provision regarding the duration of their validity. ¹⁷ But exactly what would constitute a reasonable time is problematic.

One approach to the specification of a reasonable time may be to disallow states from withdrawing because they have learned of an impending lawsuit against them. However, the evidentiary problems posed by such a standard are obvious, irrespective of its merits. A second possibility, more objective than the first, is to specify that no notice of withdrawal will be effective if given sooner than 6 months after the occurrence of the events

¹⁵ S. REP. NO. 1835, 79th Cong., 2d Sess. 1, 5 (1946). Unfortunately, withdrawal in the face of a threatened lawsuit seems to be precisely what the U.S. Government attempted to do on Apr. 6, 1984, when the Secretary of State notified the Secretary-General of the United Nations that the U.S. Declaration "shall not apply to disputes with any Central American state" for a period of 2 years. Three days later, Nicaragua filed its Application in the World Court against the United States. In its Judgment on jurisdiction, the Court held that the United States could not abrogate the 6-month notice provision of its 1946 Declaration. By participating in the case and by arguing vigorously, the United States went a long way toward countering the unfavorable legal image evoked by the attempted withdrawal of April 6.

¹⁶ *Nicaragua*, para. 113: In addition to Judge Schwebel's dissenting vote, Judges Oda and Jennings, concurring, would have upheld the validity of the withdrawal on Apr. 6, 1984 on the ground that Nicaragua's Declaration was theoretically terminable with no notice and hence temporal reciprocity should be applied in favor of the United States. *Id.*, 1984 ICJ REP. at 510-13, 546-50 (Oda, J., and Jennings, J., concurring, respectively). Judge Schwebel, it should be added, acknowledged strong reasons against the validity of the April 6 withdrawal. *See id.* at 617-18 (Schwebel, J., dissenting).

¹⁷ The Court's interpretation of a 3-day period as not constituting a reasonable period of time was undoubtedly made easier by the fact that the Nicaraguan Declaration says nothing about withdrawal or termination; hence, by "operation of law" it can be said that a reasonable time should be read into it. The situation would be made more difficult for the Court if it had to construe one of the several declarations that provide expressly for withdrawal to take place from the moment of notification. However, having once determined that 3 days is not a reasonable time, the Court may find it possible, when later confronted with a declaration providing for withdrawal from the "moment" of notification, to say that although withdrawal takes effect as of the moment of notification, the notification process itself must consume a reasonable period of time after preliminary notice is given to other states that the notification process has begun.

that gave rise to the cause of action; notice of withdrawal would thus be analogous to a short statute of limitations.

Such a rule would be preferable, from a defensive point of view, to the present U.S. 6-month notice period. For example, under the present provision, if the United States gives notice of termination 5 months after the occurrence of facts giving rise to a claim against it, it has to wait an additional 6 months, for a total of 11 months, until it escapes from compulsory jurisdiction; in contrast, under the statute-of-limitations type of rule, the total escape time would be only 6 months. On the other hand, the 6-month notice provision can serve as a maximum cut-off point in the event of a continuing cause of action, whereas the statute-of-limitations type of rule would be indefinitely extended if the cause of action were ongoing.

No one can predict how the Court will resolve these questions of attempted last-minute escape from compulsory jurisdiction. But the Court's decisional processes may be aided by any declaration that spells out a reasonable rule. At the very least, the Court's attention will be drawn to such a declared rule; at best, the Court may be guided by a desire to make such a rule consistent across the board.

For these reasons, the United States might well consider modifying the termination provision of its Declaration. First, the United States might add that the provisions apply to modification of its Declaration as well as to termination. Second, the United States might retain the 6-month notice provision as a final "in any event" clause. Third, the United States might provide that it may modify its Declaration, without previous notice and to take effect immediately, to exclude any dispute as to which the underlying facts occurred more than 6 months previously.¹⁸

The Connally Trap

The Connally reservation to the U.S. Declaration of acceptance of the compulsory jurisdiction of the World Court excepts from that jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." The reservation has been the subject of voluminous scholarly commentary, mostly hostile,¹⁹ and President Eisenhower urged the repeal of "our present self-judging reservation" in his State of the

¹⁸ Further, to attempt to lock in reciprocity, the United States might want to specify that it may only be sued by states whose declarations provide for a 6-month notice of modification or termination, and if the language of the declarations is not clear on this point, then the Court itself must, as a preliminary matter, determine the amount of time to be inferred from those declarations. If the Court fails to determine the meaning, or if the Court does so but determines the meaning as allowing for less than 6 months' notice, then the United States does not consent to being sued by those states. Nevertheless, for the reasons given in the text, this approach, too, may turn out to be too draconian.

¹⁹ See the references cited in Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 50 BRIT. Y.B. INT'L L. 63, §3 n.3 (1979).

Union message in 1960.²⁰ The incompatibility of that reservation with the ideal of the rule of law in international relations has been frequently asserted,²¹ and this is not the place to repeat those vague generalizations. Rather, the position is taken here that the Connally reservation ought to be omitted from a revised U.S. Declaration on the ground that its costs exceed its benefits, that it is a defense that backfires.

The principle of reciprocity assures that any state sued by the United States in the World Court may invoke the Connally reservation in its own defense. Yet that invocation will most likely be more effective offensively than if the United States invoked the reservation defensively. When the United States is plaintiff and the defendant state invokes the U.S. reservation, its validity, as the Court held in the *Norwegian Loans* case,²² is not in issue. Thus, a defendant state will have an easy ride on a plaintiff state's self-judging reservation, as Norway did in the *Loans* case. But when a state invokes its own reservation as defendant, the plaintiff can make several good arguments against it. First, the plaintiff can argue that because international law does extend to the dispute in question and hence it could not in good faith be viewed as a matter of domestic jurisdiction, the defendant's invocation of the reservation should be rejected by the Court. (Such an argument might have worked in *Norwegian Loans* if the position of the parties had been reversed.) Second, the plaintiff may argue that the self-judging reservation is incompatible with Article 36, paragraph 6 of the Statute of the Court, which provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court."²³ The plaintiff will probably not argue, with Judge Lauterpacht, that the presence of the self-judging reservation vitiates the entire declaration of acceptance of compulsory jurisdiction,²³ but rather that it simply deletes the reservation, while leaving all the other provisions of the declaration intact. Third, the plaintiff state may argue that invocation of the Connally reservation by the United States as defendant should be subject to a standard of reasonableness in order to preserve the Court's ultimate power under Article 36 to determine questions of its own jurisdiction. While a reasonableness standard would apply to both offensive and defensive uses of the Connally reservation, the ambit of reasonableness is likely to be larger in a defensive use because there it is applied against

²⁰ 42 DEP'T ST. BULL. 111, 118 (1960).

²¹ See Statement by Secretary Herter, *id.* at 227.

²² Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 ICJ REP. 9, 27 (Judgment of July 6).

²³ Dissenting in the Interhandel Case (Switz. v. U.S.), 1959 ICJ REP. 6, 95, 101-02 (Judgment of Mar. 21), Judge Lauterpacht stated that the Connally reservation,

being an essential part of the [U.S.] Declaration of Acceptance, cannot be separated from it so as to remove from the Declaration the vitiating element of inconsistency with the [ICJ] Statute and of the absence of a legal obligation. The Government of the United States, not having in law become a party, through the purported Declaration of Acceptance, to the system of the Optional Clause of Article 36(2) of the Statute, cannot invoke it as an applicant; neither can it be cited before the Court as defendant by reference to its Declaration of Acceptance.

the party that initiated and formulated the reservation. Thus, whichever of these three arguments or combination of them is used, there is a substantial probability that the United States will see its Connally reservation blunted or destroyed when used defensively in the way it was meant to be used, yet invoked successfully by a defendant state when the United States is plaintiff.

There is no substantive need for the Connally reservation. Since the World Court can only deal with questions of international law, anything that is a matter of domestic jurisdiction is ipso facto not a matter of international law.²⁴ Clearly, the Connally reservation ought to be dropped.

The Vandenberg Complication

The Vandenberg reservation to the U.S. Declaration of 1946 withholds from the Court's compulsory jurisdiction disputes arising under a multilateral treaty unless "all parties to the treaty affected by the decision are also parties to the case before the Court." The reservation was added in 1946 partly out of a sense of excess caution by a nation not familiar with the jurisprudence of the World Court (the United States had not joined the predecessor Permanent Court of International Justice), and partly perhaps to ensure that the United States not be the only one of several parties to a multilateral dispute bound by a decision of the Court. The wording of the reservation leaves much to be desired; as the Court pointed out in *Nicaragua v. United States*, is it the "parties" or the "treaty" that is "affected by the decision," and how can the Court determine who is "affected" until the final decision in the case is reached?²⁵ If the answer to the latter question is, all parties to the treaty are legally affected, then under the broad multilateral treaties prevalent today, far too many states would have to be party to every case. Indeed, in the *Nicaragua* case, since the UN Charter was broadly implicated, nearly every state in the world would have had to be a party under this literal interpretation of the Vandenberg reservation.

Under the Court's own rules regarding intervention and indispensable party practice, and under Article 63 of its Statute allowing the interpretation of any party to a treaty in question, it is clear that Senator Vandenberg's concerns are amply met by the Court's procedures. Despite a valiant attempt by the U.S. litigators to flesh out and insist upon the validity of the Vandenberg reservation, the Court dispatched it rather handily. In the future, that reservation will only serve to slow down and complicate jurisdictional questions, and—like the Connally reservation—it may hurt the United States more when invoked against this country than when used defensively. Thus, the Vandenberg reservation, together with the Connally reservation, ought to be deleted from the U.S. Declaration.

²⁴ See D'Amato, *Domestic Jurisdiction*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Instalment 10).

²⁵ *Nicaragua*, paras. 72, 75. The Court cogently posited the hypothetical that "if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State's claim to be affected." *Id.*, para. 75.

II. UNDESIRABLE MODIFICATIONS OF THE U.S. DECLARATION

There are numerous possible modifications of the U.S. Declaration of acceptance of the World Court's compulsory jurisdiction, limited only by the ingenuity of the drafter. Let us consider four types that may have current interest; each will be argued to be undesirable for various reasons.

The All-or-None Approach

A nation might condition its acceptance of the Court's compulsory jurisdiction upon the similar acceptance of all other nations. Although such a universalist sentiment is commendable, it is unrealistic, except as a rather transparent "cover" for a decision to pull out altogether. A more practical-sounding approach would be to condition acceptance upon similar action by all the members of a group, or of a region. For example, the United States might condition its acceptance upon similar acceptances by the other permanent members of the Security Council of the United Nations. Here again, the goal is a commendable one, but the method should be rejected for two decisive reasons.

First, at present, only the United States and the United Kingdom accept the compulsory jurisdiction of the Court; France, the Soviet Union and China, the other three permanent members of the Security Council, do not. France formerly adhered to the optional clause, but terminated its acceptance in 1974. For the United States now to condition its acceptance upon that of France, the Soviet Union and China would amount to a U.S. termination since there is no present prospect of acceptance by these other nations. Of course, if the United States wishes to withdraw anyway, putting its withdrawal in terms of the conditional acceptance of the other powers tends to save face and shift the guilt. Yet the action would probably be perceived as allowing U.S. policy to be determined by the lowest common denominator. World public opinion may simply interpret such an action by the United States as tantamount to saying, "If it's not good enough for the Soviet Union, it's not good enough for us." Apart from public opinion, the underlying burden of such a condition would be that acceptance of compulsory jurisdiction is a net liability and will only be shared if other major powers accept the same net liability.

Second, this latter policy assessment is incorrect. For a law-abiding nation, joining in the World Court's compulsory jurisdiction is a net asset, not a net liability. The U.S. Declaration assures the nation of an advantage vis-à-vis all other nations (at present, 46 others) that accept the Court's compulsory jurisdiction. In years to come, the United States is less likely to violate international law than those other nations, and hence is more likely to be well served by the existence of reciprocal compulsory jurisdiction. To be sure, since 1946, with few exceptions (most notably in the *Iranian Hostages* situation), the United States has not resorted to the Court as plaintiff. Yet on several occasions when it might have done so, it may have been restrained by the estimation that the Connally reservation

would be invoked against it to defeat jurisdiction.²⁶ If the United States revokes the Connally reservation, it may decide in the near future to be far more aggressive in utilizing the Court's compulsory jurisdiction.

Ironically, the permanent members of the Security Council constitute the single group of nations least likely to be hurt by adverse decisions of the World Court. They possess a veto against the only mechanism the Court has to enforce its judgments, namely, enforcement action by the Security Council. Great Britain and the United States, the only permanent members of the Security Council currently accepting the Court's compulsory jurisdiction, thus have a preferred position against all the other states accepting that jurisdiction, and have the least reason to be apprehensive about its scope and impact. Indeed, perhaps they should not be overly concerned about bringing France, Russia and China into the compulsory jurisdiction fold, since these nations also possess a veto over enforcement measures.

The Swiss Cheese Fallacy

Another possible modification of the U.S. Declaration would be to reserve certain specified subjects as being outside the ambit of compulsory jurisdiction. By thus creating "holes" in the area of substantive jurisdiction, a nation may feel protected against legal incursions into sensitive matters of national security or high national interest.

The approach, however, is fallacious, and the goals illusory. To illustrate, let us consider two examples.

First, the Canadian Declaration (several other countries, such as the Philippines and New Zealand, have made similar reservations) omits from compulsory jurisdiction

disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.²⁷

However, in the vague area thus described, as well as in any other subject-matter area, customary international law nevertheless plays a decisive role. First of all, it regulates those aspects (e.g., living resources of the sea) that come under its rules. Second, it delimits those areas that come under the

²⁶ Undoubtedly, the U.S. Government has considered going to the World Court with respect to numerous foreign policy incidents over the years, but of course it is hard to know how close these possibilities came to fruition, and for what reasons. One situation that did surface, however, occurred in 1955 when the United States sued Bulgaria. Case concerning the Aerial Incident of 27 July 1955 (U.S. v. Bulgaria), 1960 ICJ REP. 146 (Order of May 30), in which the United States discontinued proceedings in the case when it became evident that Bulgaria proposed to exercise its right to invoke the Connally reservation on a reciprocal basis. Another example that ended at the diplomatic level occurred in the 1960s when the United States threatened Canada with referring various maritime disputes to the World Court. Canada replied that in that event it would invoke the Connally Amendment.

²⁷ Declaration of Canada, Apr. 7, 1970, *supra* note 10.

littoral state's domestic jurisdiction (e.g., the marine area within Canada's territorial sea). And finally, it draws the line between general custom and special custom (the latter being subject to Canada's consent), as the World Court did in the *North Sea Continental Shelf Cases*.²⁸ The development of customary international law will proceed irrespective of this Canadian reservation. Thus, the Court, in a case involving the marine environment of Europe, Asia or Africa, could define customary law in a way that would have a great impact upon Ottawa's claims to the marine area around Canada. The net effect of the reservation might therefore be to disable Canada itself from participating in a case that could determine the content of customary law. Strategically, this makes little sense for a country with expert attorneys in international legal advocacy. Perhaps a recognition of this fact led Australia in 1975 to withdraw its Declaration of 1954, which had contained an exclusion in respect to Australia's continental shelf, and to accept the Court's compulsory jurisdiction without any subject-matter reservation.

As a second example, let us consider a possible U.S. reservation excluding disputes involving armed hostilities. In *Nicaragua v. United States*, such a reservation was argued by the United States to be implied as a limitation upon the judicial process. The Court, however, found by a vote of 16 to 0 that the ongoing armed conflict in Nicaragua was no barrier to judicial resolution of the legal aspects of that conflict. Faced with this decisive rejection of its strenuously argued position, the United States might very well contemplate adding an explicit exclusion for disputes involving armed hostilities to its declaration on compulsory jurisdiction.

Such a reservation, however, would disable the United States from resorting to the Court in many cases that may arise in the future. For example, if American diplomats are taken hostage, as occurred in Tehran in 1979, the involvement of armed hostilities (the Iranian "students" at that time stormed the American Embassy and took prisoners by force of arms) would exclude such a dispute from the jurisdiction of the Court. The same exclusion would apply if American citizens were involved in a terrorist attack abroad, especially one with the apparent complicity of the local government. But more significantly, other disputes that have begun peacefully may be escalated into armed hostilities solely to avoid the Court's jurisdiction. A dispute over fishing rights in a self-proclaimed "exclusive economic zone" might encourage a foreign country to send military vessels to the scene, and perhaps to fire warning shots at the American fishing vessel, so as to bring the dispute under the U.S. exclusion for cases involving armed hostilities. Or a military action that has ceased, and thus becomes subject to a lawsuit for damages, might be revived by intermittent military actions. It would be most ironic if a U.S. reservation regarding armed hostilities would itself lead to an escalation of armed hostilities in the world.

²⁸ (FRG v. Den.; FRG v. Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20). For an analysis of this case regarding the line between general and special custom, see D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1140-44 (1982).

Any attempt to cut a "hole" in the jurisdiction of the Court by a subject-matter exclusion may thus give rise to either or both of the negative effects discussed in the two preceding examples. In any event, it would evoke the image of a nation afraid to trust the Court on certain subjects, an image hardly conducive to the goal of encouraging all nations to settle their disputes in court rather than by resorting to military power.

Dealing from a Limited Deck

Instead of excluding certain matters from the ambit of compulsory jurisdiction, a nation might want to specify certain subjects, and those alone, to be included within the Court's jurisdiction. Thus, a nation that has not accepted compulsory jurisdiction at all might begin by accepting it solely with respect to questions involving outer space and Antarctica. Later, encouraged by the Court's jurisprudence in dealing with these subjects, that nation might add another card or two to the jurisdictional deck—for example, questions involving the law of the sea or the rights and duties of ambassadors. Gradually over time (centuries?), enough states would add enough subjects to give the Court almost universal jurisdictional competence.

There is little that is undesirable about such a procedure, and indeed it may be a feasible way of introducing reluctant states to the idea of having their disputes settled by the Court. The idea itself is time-honored, dating back to proposals for international arbitration at the end of the 19th century. But what would be a step forward for states that have not subscribed to the optional clause would just as clearly be a step backward for states that currently accept compulsory jurisdiction. For the United States to adopt a limited-deck procedure now would certainly be perceived as a retreat from the principle of compulsory jurisdiction.

That perception, however, is not a compelling reason against U.S. adoption of the procedure. What is compelling is the difficulty of specifying the subjects that are to be included and the near impossibility of defining them once they are specified. For example, suppose that the United States modifies its acceptance of the Court's compulsory jurisdiction so that the only areas included are the law of the sea and human rights. Would such a declaration have shielded the United States from the recent lawsuit by Nicaragua? By slightly changing its allegations, Nicaragua could have brought exactly the same case against the United States. It could have alleged that the U.S. mining of its harbors violated the law of the sea. It could have added that "law of the sea" jurisdiction was also implicated by the U.S. use of the high seas to ship arms to insurgent groups in Nicaragua. Finally, to bring the case within the "human rights" area, Nicaragua could have alleged that U.S. military and economic support for the insurgents in Nicaragua results directly in violations of the human rights of Nicaraguan citizens committed by the insurgents. Not only would the limitation to the law of the sea and human rights therefore not block the Nicaraguan lawsuit against the United States, but, to make matters worse, those limitations might at least arguably block a U.S. defense/counterclaim in

the same case that U.S. military and paramilitary activity in the region is designed to contain Nicaraguan aggression against its neighbors. Attorneys for Nicaragua would certainly argue that external aggression does not come within the U.S. subject-matter limitations of law of the sea and human rights.

These pitfalls of dealing from a limited deck suggest that there are serious problems in confining acceptance of compulsory jurisdiction to specified subjects.

Passing the Buck

A fourth possible reservation to the U.S. Declaration would be to consider excluding those matters which are under consideration by the political organs of the United Nations—the Security Council or the General Assembly. This possibility grows out of the “political question” approach taken by the United States in *Nicaragua v. United States*, where it was argued that the Nicaraguan claim was inadmissible because Nicaragua had also asked the Security Council for a condemnation of U.S. military and paramilitary activities in and against Nicaragua. The Court held against the United States on this point, again by a vote of 16 to 0. It pointed out that although the Security Council is given “primary responsibility for the maintenance of international peace and security” under Article 24 of the UN Charter, “primary” does not mean “exclusive.” Undoubtedly, the United States will want to consider making a “political question” exception an explicit part of its acceptance of compulsory jurisdiction.

One model for such a reservation is the Declaration of the United Kingdom and other Commonwealth countries under Article 36, paragraph 2 of the Statute of the Permanent Court of International Justice. The British reservation allowed the British Government to suspend judicial proceedings in respect of any dispute “which has been submitted to and is under consideration by the Council of the League of Nations.”²⁹ What would a similar reservation entail, substituting “Security Council” for the Council of the League?

In the first place, under the principle of reciprocity, such a reservation would allow either the plaintiff or the defendant state to suspend judicial proceedings. Second, since under Article 35 of the UN Charter, any member state may bring a dispute to the attention of the Security Council, the judicial proceedings would be subject to suspension not only by the action of either party to the dispute but also by the action of any other state. With so many current member states in the United Nations, there will surely be one state that will have an interest, even if only a perverse one, in bringing a litigated case before the Security Council so as to suspend the litigation. Third, however, under the model we are looking at, suspension of the litigation would only occur if the Security Council

²⁹ Declaration of the United Kingdom of Great Britain and Northern Ireland, Feb. 28, 1940, LEAGUE OF NATIONS O.J. Spec. Supp. 193, at 39 (1944).

decided as a matter of its own procedure to consider the dispute. Since procedural questions are not subject to veto, but require only an affirmative vote of 9 out of the 15 members of the Security Council under Article 27 of the Charter, litigation may very well be suspended for reasons that have nothing to do with the nature of the litigation or its merits, but purely for political reasons known to the 9 affirmatively voting members of the Council.

The disruptive effects upon the Court's judicial processes, possibly random and nonsensical, make this passing-the-buck type of reservation undesirable. We know too much now about the political nature of voting in the United Nations to be as complacent about giving those political organs preemptive jurisdictional powers as were the old members of the League of Nations. For the United States in particular, contemplation of greater offensive use of the World Court to secure the rule of law would be undercut by any provision that allows any nine members of the Security Council to thwart litigation before the Court.

We might briefly contemplate an interesting variation on the above theme: dis-seising the Court of litigation only if the Security Council, including the five permanent members, agrees to consider the dispute. Under such a stipulation, the United States would ensure the necessity of its own consent, as a permanent member of the Council, before any suspension of litigation could take place. However, the Court would probably see through such an attempt as a disguised self-serving reservation. Analogously to arguments that can be made about the Connally reservation, the Court may rule that passing the buck to oneself strips the Court of its statutory right to determine questions of its jurisdiction and is hence invalid. A second argument for its invalidity would be the inherent lack of reciprocity in the arrangement: the other party to the dispute with the United States would not have a similar power in the Security Council unless it happened to be one of the other four permanent members. Third, under the principle that voting rules specified in the Charter cannot be modified by specific treaties, the Court is likely to strike down such an attempt to condition jurisdiction on a particular majority vote in the Security Council.

Finally, any attempt to attach to a passing-the-buck type of reservation the provision that it applies only to disputes that endanger international peace and security will not suffice to cure the problems previously mentioned. The World Court will undoubtedly itself decide whether the dispute is likely to endanger peace and security, under its statutory power to determine questions regarding its own jurisdiction. We should then not be too surprised if the Court held that the dispute cannot endanger peace and security so long as it is subject to the Court's own jurisdiction and resolvable by the application of accepted principles of customary international law.

III. IS COMPULSORY JURISDICTION ITSELF DESIRABLE?

At this point, an American policymaker might concede that certain desirable modifications can be made to the U.S. Declaration accepting the

World Court's compulsory jurisdiction, and that other possible modifications either will not work or might backfire, but he or she may feel that the entire enterprise is still not in the national interest. Let us assume that such a policymaker neither denies the importance of the rule of law in international affairs nor contests the desirability of having disputes resolved judicially rather than militarily. Rather, our policymaker is not persuaded either that the present rules of customary international law are in the U.S. interest or that the World Court, as currently constituted, can be expected to define and apply international law in a manner consonant with U.S. interests. Such a policymaker may conclude—as apparently his or her counterparts in France, China and the Soviet Union have so far concluded—that it is not in the national interest to submit to the compulsory jurisdiction of the Court with or without reservations.

The policymaker's concerns are real and must be addressed. They cannot be fully answered here. But the contours of the problems can be suggested, and relevant lines of inquiry can be offered in outline form.

International Law and the National Interest

Denigrating the importance of international law is a common phenomenon among journalists and commentators when they are attempting to be ultrarealistic. Yet it may be useful, even if boring, to consider the numerous, vast subjects regulated by international law (and usually regulated so well that they remain utterly unnewsworthy): boundaries of nations on land or at sea, international servitudes, succession of states and governments, ports and inland waters, international rivers and lakes, territorial waters, contiguous zones, continental shelf, exclusive economic zones, international canals and straits, rights and duties of states on the high seas, fisheries, whaling and sealing, air navigation, polar regions, outer space, nationality and status of ships, piracy, slavery, international traffic in women and children and in narcotic drugs, nationality and statelessness, rights of aliens, asylum, extradition, international communications, protection of minorities, human rights, governmental and state immunities, diplomatic and consular privileges and immunities, status and immunities of international organizations and their personnel, status of armed forces on foreign territory, limits of criminal jurisdiction, limits of antitrust jurisdiction, enforcement of foreign judgments and commercial arbitral awards, validity of international treaties and agreements, interpretation and application and termination of treaties and agreements, validity and interpretation of international arbitral awards, pacific blockade, reprisals, indirect aggression and subversion, rights of neutrals, relations between belligerents and neutrals, violations of the laws of war, terrorism and hijacking, and overlying all of these, the limits of countermeasures and retaliatory measures designed to protect existing primary rules of international law.³⁰

³⁰ The list is taken largely from the Draft General Treaty on the Peaceful Settlement of International Disputes, Art. 29, prepared for the American Bar Association by Professor Louis B. Sohn, July 1983.

The rules of international law covering these subjects were not imposed on states from on high, but rather grew out of their interactions over centuries of practice and became established as customary international law.³¹ Thus the rules, almost by definition, are the most efficient possible rules for avoiding international friction and for accommodating the collective self-interest of all states.

Clearly, the vast bulk of the rules of international law serve the peaceful interests of the United States. But in a world that has changed significantly from that envisioned by the framers of the United Nations and the International Court of Justice in 1945, at least two major rules now clash that were thought in 1945 to fit well together and even reinforce each other. The clash of these two general rules poses a problem for the United States that cannot be glossed over by a general commitment to international law.

The first of these rules is the prohibition of transboundary military force against the territorial integrity or political independence of another state. The second is the cluster of human rights that are increasingly articulated in treaties and passing into customary international law, such as the interdictions against genocide, torture, slavery and the denial of basic human liberties. However, human rights are often denied within the borders of a state either by, or with the complicity of, the government or the military. It follows that one way to prevent such transgressions of human rights is the application of transboundary force against the delinquent government; yet to do so would apparently violate the first rule.³² Although the framers of the United Nations did not see, or dimly saw, this possible clash of rules, they did in fact provide a mechanism for an international police power. But that mechanism, the Security Council's chapter VII powers, was stillborn; the veto prevented, and continues to prevent, its utilization. Absent this international mechanism, each state must decide for itself how to resolve the clash between the two rules.

There are signs that the United States is moving in the direction of enforcing the second rule at the expense of the first. The use of military and paramilitary force by the United States in other countries to preserve basic human rights is becoming increasingly apparent. The intervention in Grenada prevented a dictatorial group that had just assassinated the leaders of the democratic government from taking over the country by force. The present military and paramilitary intervention in and against Nicaragua, the subject of *Nicaragua v. United States*, seeks its justification in the attempt to ensure that the people of Nicaragua are not brutalized by an undemocratic government that will deny them their basic human freedoms.

Of course, conventional commentary will say that the United States has simply tried to ensure that a government friendly to itself will prevail in

³¹ See D'Amato, *Is International Law Really "Law"?*, 80 NW. L. REV. (1985).

³² Nevertheless, the transboundary force rule may be permeable. For an argument that Article 2(4) was not violated by Israel's use of transboundary military force against a nuclear reactor in the territory of Iraq, see D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AJIL 584 (1983). See also *infra* note 35.

these countries, and that its military actions abroad are therefore no different from those of the Soviet Union vis-à-vis Afghanistan or the Eastern bloc nations. But this simplistic equation ignores the fundamental point that the United States, by committing itself to governments abroad that reflect the genuine wishes of their peoples, is just as committed to accepting unfriendly governments if democratically elected. In sharp contrast, the Soviet Union is interested solely in friendly or "puppet" regimes. Unlike the United States, the Soviet Union is not interested in securing the freedom of choice, irrespective of outcome, of the citizens of the countries in question.

The United States can expect to find itself increasingly charged with violations of the rule against the transboundary use of military force as it acts abroad to secure basic human rights of foreign persons against their own governments. Does this mean that international law, as currently constituted, is a barrier to these U.S. aspirations?

Some publicists will certainly denounce transboundary military force as illegal, but that may only indicate that they have not thought through the human rights question. For example, would any nation or publicist outside of South Africa say that Article 2(4) was an absolute barrier to military force against the South African Government if that Government (improbably) set up Nazi-type death camps against its black population? Clearly, the rule against transboundary military force would give way when confronted with a genocidal denial of human rights. The principle carries through to less extreme cases. Ultimately, what claim does a state have to the sanctity of its borders against foreign military force if it uses its sovereign isolation to subjugate its own powerless citizens?

In sum, even if most of the rules of international law suggested by the categories given at the outset of this subsection are in the interest of the United States, it must be conceded that at least one major rule—transboundary military force—may not be. But that rule is itself undergoing revaluation against the powerful claims of human rights in international law. It may only be a temporary impediment to U.S. practice. Indeed, because customary law results *from* practice, a sophisticated study of the rule against transboundary military force may even at present show that that rule is eclipsed by human rights considerations (as in the many examples of so-called humanitarian intervention). Thus, time is clearly on the side of the United States in this regard.³³

*The World Court and the National Interest*³⁴

The judges on the World Court may possibly be unpersuaded by the foregoing argument that the rise of human rights law has eclipsed the rule against transboundary military force. Further, they may decide in

³³ The customary practice underlying Article 2(4) of the UN Charter already has shifted and changed the meaning of its terms, transforming the treaty rule into a rule of customary law that more accurately reflects the competing needs of states. See, e.g., Franck, *Who Killed Article 2(4)?*, 64 AJIL 809 (1970).

³⁴ See Rovine, *The National Interest and the World Court*, in 1 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 313 (L. Gross ed. 1976).

favor of the plaintiff on the merits in *Nicaragua v. United States*. Does it follow that the United States should seriously consider renouncing the compulsory jurisdiction of that Court?

In the first place, one should not lose sight of the fact that in a recent case all of the judges of the World Court, with the sole exception of the Soviet judge, found that a use of transboundary military force by the United States for a human rights purpose was completely legal under international law. The use of force was President Carter's aborted rescue mission of April 24-25, 1980, against Iranian airspace and territory. By awarding reparations to the United States against Iran for the diplomatic hostages held by Iran *without* deducting any amount (even a nominal one) to compensate Iran for the incursion against its territory, the World Court showed that it could take a sophisticated view of international law in favor of a superpower against a Third World nation.³⁵

Nevertheless, it may be too much to expect the Court to extend its view in that aspect of the *Hostages* case to the more continuous and sustained use of force for a possibly less clear objective in *Nicaragua v. United States*. If so, it may be explained largely by drawbacks in the way judges are retained and compensated for their services on the Court. The present tenure is for 9 years, and the salary level is modest. As a result, the judges remain very much committed to their home nations. Moreover, their families and extended families have their roots at home; hence, they may be unprepared to assert judicial independence from their home governments. If, however, the term of office were increased to lifetime tenure, and the salary were substantially raised to assure independence for the judge and his family, greater impartiality would probably obtain.

Judicial impartiality is especially needed when the legal question involves a confrontation of the two rules discussed in the preceding subsection. For the rule against the transboundary use of force is one that many governments hold dear; it defends their sovereign prerogatives at home and shields them from external accountability. Even if, or especially if, a government is actively involved in transgressing the human rights of its own citizens, it will piously assert its claim to sovereignty and the fundamentality of Article 2(4) of the Charter. Correspondingly, any judge it sends to the World Court under present circumstances will feel a strong pressure to support that basic outlook irrespective of the judge's own qualms about the human rights violations.

Yet, apart from tenure and salary, the method of selecting judges for the Court is commendable. It has yielded sophisticated jurists of interna-

³⁵ Many readers will probably dispute the argument made here. They will point to statements by the Court in its opinion that the U.S. military incursion was not an issue before the Court or that it amounted at worst to a disrespect for the Court's adjudicatory procedures in an ongoing case. But what the Court did is more important than what it said. It adjudicated all the legal issues in the case, concluded that Iran owed reparations to the United States, and despite Judge Morozov's pointed reference to the matter in dissent, provided no offset in any amount for the damage or even nominal insult to Iran's territory occasioned by the American incursion. For a full statement of this argument, see D'Amato, *supra* note 28, at 1152-54.

tional law. The opinions of the Court in general compare favorably in clarity, logic and scholarly depth with recent opinions of the U.S. Supreme Court. The World Court's opinions are the more remarkable because of the vastly different legal systems represented by the judges.³⁶

On balance, it would be more in the interest of the United States to improve the World Court than to abandon it. The way to deal with a possible loss in a given case is to initiate many cases; the public hardly notices when the U.S. Government loses a case in the Supreme Court.

Senator Moynihan summed it up well when he advocated respecting the World Court's procedures at the time Nicaragua filed its suit against the United States: "We are—when we have our wits about us—a law-abiding nation. It is in our interest that others should be. If, for example, the Soviets are not, then that is their problem. If, because the Soviets are not, we cease to be, then that is their victory."³⁷

ANTHONY D'AMATO*

POLITICAL AND ECONOMIC COERCION IN CONTEMPORARY INTERNATIONAL LAW

I. USE OF FORCE AND USAGE OF DIPLOMACY

The issues implied by the term "political and economic aggression" cannot be considered adequately outside the context of the broad questions: In their ongoing relations, what means may states employ to influence each other's policies? And to what ends? Means may for analytical purposes be divided into those of a cooperative and those of a coercive character. The former are proposals of all kinds for joint and mutually beneficial action, the mutual benefits being a function of cooperative behavior. The latter, however disguised, are threats.

Most people instinctively divide threats into two categories. On the one hand, there are threats not to give some benefit, or to withdraw one previously given, to which the threatened state is not legally entitled. Economic aid is an example: there is no legal obligation to give it in the first place or to continue giving it, however great the degree of dependence it has created. On the other hand, there are threats with respect to what could be called entitlements: for example, the threat by one member of GATT, the General Agreement on Tariffs and Trade, to deny "most favored nation" treatment to another.

³⁶ See generally L. Gross (ed.), *supra* note 34.

³⁷ Moynihan, *International Law and International Order*, 11 SYRACUSE J. INT'L L. & COM. 1, 8 (1984).

* Portions of this paper are based on an address given by the author to the John Bassett Moore Society of International Law at the University of Virginia School of Law, Nov. 16, 1984. The author would like to thank Professor Louis B. Sohn, Professor Edward Gordon and Dr. Paul C. Szasz for their helpful comments.

Declarations by the United Nations and regional organizations concerning intervention often blur this distinction. Exemplary in this respect is Article 16 of the Charter of the Organization of American States. "No State," it proclaims, "may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." There is an almost identical statement in the 1970 United Nations Declaration on Friendly Relations. As a legal proposition, such language is perfectly empty; for if read literally, it would outlaw diplomacy. Threats, more or less subtle, have always been an important feature of the intercourse of states, even among allies. Take, for instance, the Multi-Fibre Agreement, which regulates the international textile industry and prevents Singapore and Hong Kong and Taiwan from flooding the United States with their products. We say to them, "We would like you to enter into this Multi-Fibre Agreement." Is this an example of cooperation? No! If they don't enter into the Agreement, we will then erect a high tariff and they will export nothing to the United States. Though they agree "in a cooperative spirit," the agreement is coerced.

One can effortlessly locate myriad other examples of coercive diplomacy whose legitimacy is rarely, if ever, questioned. For the last 30-odd years, the North Atlantic Treaty Organization has restricted exports of strategic goods to the USSR without anyone in the Kremlin raising any legal objection. Or consider the conditions that are imposed on borrowers by the International Monetary Fund, conditions inhibiting national discretion concerning issues of fundamental importance to the polity. The international community clearly believes that many tactics for making states behave in ways they would prefer not to behave are well within the realm of its law.

The nub of the matter is that the word "coercion" has no normative significance; there is nothing illegal about coercion. Coercion is normal in all human relationships, including those between lovers. It's part of life. So is cooperation. Indeed, every human relationship is some mixture of coercion and cooperation. So to say that a particular relationship is coercive is to say nothing at all about its legitimacy.

The failure to draw explicit and detailed distinctions and the related preference for abstract, consensus statements in international forums have succeeded only in obscuring the real legal and moral choices. Nor has analysis of the limits of legitimate coercion been helped by a tendency to speak about coercion in static terms, that is, to attempt to look at or to legislate about discrete events. One singles out a particular event and says, "Ah, this is aggression" of one kind or another, ignoring the fact that every event is embedded in an ongoing process of relations between states that goes on forever, particularly in the era of the United Nations when no state is allowed to disappear involuntarily.

The original effort to reduce the definition of aggression to the first use of force, the position particularly of the Soviet Union, was an extreme example of this tendency to define illegitimate coercion by selecting a

single event, rather than looking at a ceaseless stream of events. On the other hand, it does not follow that we should never decide to treat certain cases as impermissible regardless of context. Sometimes we should single out events as being so important and so dangerous that we are not interested in explanation or justification. "Don't tell us about the context. If the act occurred, we want to punitively sanction it."

But those are exceptional cases, and we should recognize them as such. Just as, in the plane of human rights, no threat to the security of the state can justify torture or summary execution, so, in the plane of interstate relations, we might wish to agree that nothing can justify, to give one possible example, the first use of weapons of mass destruction. (Many of us might want to agree on that; but, of course, the fact is that there is no consensus even on that question.)

II. ECONOMIC AND POLITICAL AGGRESSION

Political Aggression

The most frequently cited tangible aspect of political aggression is propaganda: the projection of words across national frontiers. The claim that merely by sending information into another state, you can aggress against that state by arousing its cheerfully somnolent population seems to me uncomfortably similar to the proposition, reiterated in the United States during the civil rights struggle, that the blacks of the South were happy people and that the only problem with civil rights in the South was all of those liberal agitators from the North who came down and told people that they were not happy. Under this theory, the civil rights campaign was an improper intrusion into the internal affairs of the South. My own judgment is that if people are relatively satisfied with their government, you can send propaganda into the country 24 hours a day, 365 days a year without any significant consequence. If, however, people feel oppressed to begin with, then information apprising them about their human rights and sketching the means they might use to mitigate or alter their condition may, indeed, be dangerous. But I certainly am not prepared to question its legitimacy, unless we are talking about detailed instructions for organizing an uprising. So I would be inclined to say simply that *I reject the notion of political aggression by means of the projection of words, unless the projection is part of a campaign to destroy a recognized government not guilty of grave violations of human rights.* Where the political instrument is used unaccompanied by economic and military pressures, it seems very unlikely to effect a major change in the target state unless a substantial part of that state's population wishes to exercise its human right, for example, to self-determination or participation in government.

Economic Aggression

One way of approaching the issue of economic aggression is by asking two questions. First, are there any circumstances in which the use of

economic instruments, although not in violation of any specific treaty like the GATT, is or should be deemed to be a violation of international law? Second, if we can identify such circumstances, does their existence ever justify a military response? Even scholars eager to attribute to states a broad discretion in the use of armed force concede that many violations of international law are not of sufficient importance or severity to justify a military response.¹ Can we or should we say that certain economic "aggressions" are so comparable to military aggression that an injured state and its friends may exercise the right of collective self-defense?

Those are the two organizing questions. Although analytically distinct, they are often aggregated into a single question, which is sometimes put in these terms: Can economic coercion be aggression and/or a violation of Article 2, paragraph 4 of the United Nations Charter? Before beginning my answer, perhaps I should define the subject, "economic coercion," with greater clarity. By economic "coercion" (using "aggression" would beg the question of legality), I mean efforts to project influence across frontiers by denying or conditioning access to a country's resources, raw materials, semi- or finished products, capital, technology, services or consumers. That seems to me to encompass the full range of economic instruments.

The Article 2(4) Debate. One properly approaches this issue by way of the debate over the meaning of Article 2, paragraph 4 of the UN Charter, which prohibits the use of "force" or the threat thereof against the political independence or territorial integrity of any state or in any other way inconsistent with the purposes of the United Nations.² By 1960, two general lines of interpretation had emerged. On the one hand was the view that Article 2(4), in conjunction with Article 51 (stating that nothing in the Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs), divides the universe of force into three parts: aggression, self-defense against armed attack (with some dispute about whether one can preempt in case the armed attack is imminent) and sanctions authorized or ordered by the Security Council. It followed from this interpretation of the Charter that economic coercion could never justify recourse to force, since the only justification for force is prior (or imminent) armed force by one's adversary.

Advocates of the other line of interpretation insist that Article 2(4) outlaws any form of coercion that seriously threatens fundamental national interests—at a minimum, territorial integrity and political independence—and, conversely, that Article 2(4) leaves states free to defend those interests with force, subject to the general principles of proportionality, minimum force and exhaustion of nonviolent means. In other words, people who adhere to this interpretation construe the word "force" to include non-military forms of coercion. The use of military force to defend vital interests *threatened, without legal justification, by any means whatsoever*, this

¹ See, e.g., D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* (1958).

² See generally Farer, *Law and War*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER*, vol. III: *CONFLICT MANAGEMENT* 15 (C. Black & R. Falk eds. 1971).

second school argues, could not violate Article 2(4) because by definition this "defensive" use of force does not challenge territorial integrity or political independence and, being an effort to vindicate legal rights, cannot be inconsistent with the principles and purposes of the Charter. The latter proposition is, of course, a non sequitur. If, as many believe, the authors and ratifiers of the Charter had a hierarchy of values and the maintenance of peace, to the extent consistent with the maintenance of postwar frontiers, was at its apex, then force can be used legitimately to vindicate *only* the legal right to political independence and territorial integrity, and even then possibly only when that right is threatened by another state's threat to use force. It is, nevertheless, a non sequitur very appealing to many scholars³ and certain powerful states.

What about Article 51? How can they explain away its reference to "armed attack"? They have employed principally two techniques. One is to decouple Article 51, which appears in chapter VII of the Charter, from Article 2, which appears in chapter I. According to the decoupling argument, Article 51 is relevant only in cases where the Security Council is deliberating but not acting effectively. Article 51 was designed, in other words, to reassure states of their right to fight defensively even in cases where the Council has asserted jurisdiction. It was not intended to widen or clarify Article 2's limits on the use of force. However, the main thrust of the loose-constructionists falls on Article 51's reference to the "inherent right of self-defense." The word "inherent," they argue, is a reference to the pre-Charter practice of states. Particularly from 1800 to the end of the First World War, the classical period of international law, self-defense was invoked on behalf of much more varied state interests than simply protection against armed attack. Relying on this history, Derek Bowett, for example, has argued that the Charter reference to self-defense could include the defense of nationals; it could even include the defense of property from confiscation where the property was important to the security of the state, as one might have argued was true of ARAMCO's oil wells in Saudi Arabia. Julius Stone has gone even further, contending that military force is an acceptable last resort wherever one state threatens major interests of another state by coercive means. He puts it this way: No major change in the distribution of wealth, power or any other value can be effected in the international system by highly coercive means. In so arguing, he opens the door to the use of force in a great range of situations.

One of the major justifications for this position is that, where the language of an international agreement permits either of two interpretations, one should always adopt the interpretation which is least inconsistent with preexisting law. I accept that as a general guide to interpretation, but not in the specific case of the UN Charter. For the Charter was designed to alter radically, or at least to confirm a radical alteration, in customary international law. In its historical context, this intention is

³ See, e.g., J. STONE, *AGGRESSION AND WORLD ORDER* (1958).

unmistakable. The Charter was only one of several contemporaneous acts denoting a desire and intention to break with the past. The Nuremberg trials also demonstrated this intention. For the first time in history, people were prosecuted for the crime of aggressive war.

What I find preeminent in the *travaux préparatoires* for the United Nations Charter is a desire quite simply to outlaw war as an instrument of state policy or self-help. The parties to the Charter were clearly concerned about the use of *military* force. Revealingly, there were some efforts by small states to introduce the concept of economic coercion into the Charter at the very outset. These efforts were categorically defeated. Moreover, the whole emphasis of the purposes and principles of the Charter is on peace, the prevention of armed conflict. Furthermore, it is suggestive that the United Nations has never been thought to have chapter VII jurisdiction in cases not involving a *military* threat by one state against another. Finally, one should note that the United States has, from the Charter's early days, used economic coercion often without legal challenge, and certainly in the belief that any such challenge would be baseless. So looking at the history of the Charter, the context of the Charter and the early and thereafter sustained behavior of founding states, I think it must be concluded that Article 2(4) was concerned with violence, with military force, not with economic coercion.

Post-Charter Practice. I also do not think it can be argued persuasively that state practice over the past four decades has altered this feature of Charter law. Perhaps the single most relevant legislative activity at the United Nations was the effort to define aggression. The text of the 1974 consensus definition lends support, albeit slender, to the proposition that economic coercion *cannot* justify recourse to force. The UN consensus defined aggression as the use of armed force by a state. The reference to "armed force" surely suggests that aggression cannot be carried out by any other means. To be fair, however, the legislative exercise is a good deal less than decisive on this point, since the text of Article 1 of the consensus definition says: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. . . ."⁴ That being just a restatement of Article 2(4), arguably the language adds or subtracts nothing; the prior dispute is left untouched. In fact, Julius Stone, in his more recent work on the question of economic aggression,⁵ has employed the definitional effort to buttress his position.

Article 5 of the consensus definition says no consideration, of whatever nature, whether political, economic, military or otherwise, can serve as a justification for aggression. Is it decisive on the question of whether one state can respond with force to economic coercion by another? No! It says only that economic factors cannot justify "aggression." And thus it does

⁴ GA Res. 3314 (XXIX) (1974).

⁵ J. STONE, *CONFLICT THROUGH CONSENSUS* (1977).

not speak directly to Stone's claim that force may sometimes be a legal—not an aggressive, but essentially a defensive—response to unjust economic coercion. One finds in the debates about the definition equivocating statements by delegates concerning the proposition that economic coercion can be aggression. Many delegates said, in effect, "It could be, but force is the most important kind of aggression. So in the consensus definition we will emphasize force, and leave the definition of other forms of aggression to another time." Stone finds telling this concession that *military force is only one form of aggression*.

Finally, if I were eager to reinforce Stone's arguments, I would call attention to the Preamble of the consensus definition. It reaffirms the Declaration on Friendly Relations. And the Declaration on Friendly Relations says: "No State may use or encourage the use of economic . . . measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."⁶ So if the definition of aggression has any precedential value, it probably does more to support the loose-constructionist view of Article 2(4) than the more restricted view of the legitimate occasions for force I have traditionally favored. Taking into account the at best inconclusive character of the definitional exercise, the clear language of the Declaration of Friendly Relations, the earlier General Assembly resolution on nonintervention prohibiting "measures of an economic and compelling character to force the will of the State" and taking into account as well the language of the OAS Charter, I conclude that under some conceivable conditions, economic coercion can be a violation of international law even where the means employed do not themselves violate any treaty. However, in light of state practice, I believe that the requisite conditions are so unlikely to occur that a state's use of economic power to influence another state is *prima facie* legitimate or, even if arguably illegitimate, not the sort of delinquency the target state is entitled to regard as "aggression"; an enormously heavy burden of proof must lie on the state claiming otherwise.

Coercion as Aggression. Under what conditions might it be appropriate to treat economic coercion as aggression? In their study of aggression, Ann and A. J. Thomas announce that coercive activity of an economic nature cannot be exercised "for the sole purpose of causing injury to and forcing the will of another state, unless [it] is used in the exercise of the right of self-defense or reprisal."⁷ Are we likely to catch many fish in this definitional net? In order to be a violation, the economic measures must, to begin with, have as their exclusive purpose causing injury to another state. Secondly, even in the unlikely case where the infliction of injury is its own and only reward, the coercion is excused if it is an act of self-defense or if it is a reprisal. I note in passing that if the measures are

⁶ GA Res. 2625 (XXV) (1970).

⁷ A. THOMAS & A. J. THOMAS, JR., *THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW* 90-91 (1972).

taken in self-defense or as a reprisal, by definition they are not adopted for the exclusive purpose of causing injury.

Those commentators and diplomats eager to justify the use of military force as a response to economic coercion generally train their guns on the 1973 Arab oil boycott, or on an imagined future oil boycott. For example, in his *Conflict through Consensus*,⁸ Stone repeatedly implies that the 1973 boycott violated Article 2, paragraph 4, and that the United States could therefore have exercised the right of self-defense.

What was the nature of the violation? Stone apparently believes it is so apparent as not to require definition. I can only speculate that, if pressed, he would describe the violation as threatening grave disruption of the economies of the United States and its allies unless they yielded their sovereign discretion over foreign relations and agreed, against their "will" (i.e., their preference in the absence of a boycott), to sanction Israel. If I understand him correctly—not an entirely easy matter in this instance—Stone does not go so far as to claim that Arab efforts to restrain support for Israel threaten the political independence of the United States; rather, he sees Article 2(4) as protecting a right of sovereignty broader than political independence, a right which encompasses freedom to set any course in foreign policy which is legally permissible. Using economic weapons to constrain that freedom presumably constitutes for him a use of force inconsistent with the purpose of the United Nations. In support of this position, he notes in his book that the Declaration on Friendly Relations precludes "measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights." He also notes that the definition of aggression (Article 1 of the consensus definition) refers to aggression against sovereignty, and then adds political independence and territorial integrity. So, he suggests, we have evolved since 1945. Not only does the UN Charter protect territorial integrity and political independence, but it protects something vaguer and larger called "sovereignty." And that is one of the basic values or state interests which, by being threatened, constitutes an element of the crime of aggression.

How might counsel for the Arab states respond to Stone's claims? If I were that counsel, I would probably begin by noting that the United Nations has, in multiple resolutions, recognized a state's sovereignty over its natural resources. Indeed, these resolutions, supported by the great majority of UN members, have literally conceded to states an absolute discretion over the ownership and control of their resources. How, then, can a decision not to export violate international law? Requiring states to provide scarce resources to other states is simply inconsistent with the idea of sovereignty as it existed before as well as after the passage of these resolutions. Certainly on the face of the matter, it is very hard to understand how the refusal to provide scarce resources can be a violation of some other country's sovereign rights.

That would be the first argument I would make for the Arab states. Second, I would argue that the Israeli occupation of Gaza and the West

⁸ Note 5 *supra*.

Bank violated rights of national self-determination reaffirmed, among many other places, in Article 7 of the Definition of Aggression. And that coercion, exercised by third states on behalf of those rights, is legitimate, *as long as it is nonmilitary in character*. Third, the weakest argument, I think, is that the Israeli occupation of East Jerusalem and the West Bank violated either the territorial integrity of Jordan or Jordan's interest as a sort of trustee for the Palestinian people's ultimate interest in these territories. If the boycott were to occur again today—an implausible hypothetical in light of the oil glut, the diminishing financial reserves of the Arab members of OPEC and other factors—the Saudis might add two additional considerations: first, that Israel, through its West Bank policy, has committed itself to a form of occupation which involves the permanent suppression of the rights of the Palestinian people; and, second, that the methods the Israelis have employed in the occupation (collective punishment, detention and exile without due process; relatively violent forms of riot control; land and water seizures) involve grave violations of human rights. The use of economic coercion is a legitimate response to such violations. Finally, it might be argued that the West has had adequate time to reduce its dependency on Arab oil, but has chosen not to; therefore, even assuming some semi-entitlement arises from a long period of dependence, this entitlement disappears over time when there is adequate warning that the resources may not be available.

In conclusion, I find significance in the fact that the case most frequently cited as an example of economic aggression justifying recourse to force does not seem to fall within the prohibition of Article 2, paragraph 4. In defining economic aggression, I myself would be willing to go no further than treating economic coercion as aggression when, and only when, the *objective* of the coercion is to liquidate an existing state or to reduce that state to the position of a satellite. There must, moreover, be a connection between the attempt at coercion and the realization of its objective. If, for instance, one could demonstrate that the oil boycott was part of a strategy to liquidate the Israeli state and that the boycott confronted the United States or Japan or Western Europe with the alternatives of joining the conspiracy to liquidate Israel—whether by acts of commission or omission—or experiencing grave social and economic costs as a consequence of the boycott, then one might conceivably treat the economic coercion as a kind of aggression. Any credible attempt to destroy another state violates Charter norms no less basic than the restraints on recourse to force. But, if the intention of a boycott or any other act of economic coercion is to influence the foreign policy of one state as part of an effort to cause the transfer of territory where sovereignty is problematical, as in the case of the West Bank, I regard that as a legitimate act of coercion within a decentralized international system.

For the sake of survival, we have tried to harness force. But unless and until we build a real international community, other forms of coercion will remain as instruments for the games nations play.

TOM J. FARER

WHAT PRICE EXPROPRIATION?

COMPENSATION FOR EXPROPRIATION: THE CASE LAW

Controversy continues to rage over whether the "Hull formula," requiring the payment of "prompt, adequate and effective" compensation for the otherwise lawful taking of aliens' property by the state, represents or has ever represented the customary international law standard. Draft section 712 of the American Law Institute's *Restatement of the Foreign Relations Law of the United States (Revised)*¹ simply states the standard as "just compensation." Comment *e* does, it is true, assert that the United States has consistently championed the Hull formula; but all in all, the text accompanying draft section 712 is somewhat guarded as to the position in general international law. In the January 1984 issue of this *Journal*, Davis R. Robinson, Legal Adviser of the State Department, criticized the draftsmen's hesitancy about what he called the "traditional standard."² Battle was immediately joined by Professor Oscar Schachter who, in the same issue, questioned whether the so-called traditional standard is or ever was a rule of customary law.³

For various reasons, it would be inappropriate for me here to enter into a comprehensive examination of the current position in customary law, let alone embark on a discussion of the possible merits or demerits of various standards of compensation as a matter of *lex ferenda*. Nor do I wish to comment on the present form of the draft *Restatement*. However, I would like to question what seems to me to be a potentially misleading account by Professor Schachter of a particular aspect of the matter—namely, the standard laid down by the decisions of international courts and tribunals⁴ with regard to the sufficiency of compensation.

According to the former joint editor in chief: "It is true that several 'traditional' decisions of international tribunals recognize an international obligation to pay compensation when alien property is taken by a state. However, contrary to what is often asserted, these decisions contain no

¹ RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §712 (Tent. Draft No. 3, 1982).

² *Expropriation in the Restatement (Revised)*, 78 AJIL 176 (1984).

³ *Compensation for Expropriation*, *id.* at 121.

⁴ Schachter largely eschews discussion of the decisions of municipal courts and tribunals, and I shall follow suit. It should be noted, however, that the widespread use in treaties of a phrase based on the Hull formula has recently been held by the U.S. Court of Appeals for the Sixth Circuit to be sufficiently unambiguous to provide a "controlling legal standard" within the meaning of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *see Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984).

reference to the 'prompt, adequate and effective' standard."⁵ This statement may be true in a literal sense; but, when it is made in the context of a broader thesis that "just compensation" is a flexible standard which does not necessarily require payment in full,⁶ the natural implication is that the cases support, or at least do not contradict, his thesis. If this is what Professor Schachter means to suggest, it is respectfully submitted that he is mistaken; if it is not what he means, the ambiguity is very unfortunate. Whilst the cases do not espouse the Hull formula in so many words, they do require the payment of full compensation and provide no support for a flexible standard in this regard.

PREWAR CASES

Professor Schachter tells us that "probably the most frequently cited opinion in this field," the *Chorzów Factory* case in the Permanent Court of International Justice,⁷ "refers only to a duty to [*sic*] 'payment of fair compensation.'"⁸ This is an inaccurate account of the Court's celebrated *obiter dicta*. The actual decision in the case turned upon a finding by the Court that Poland was in breach of its obligations to Germany under the Geneva Convention concerning Upper Silesia of May 15, 1922. In the case of an unlawful expropriation, the Court found, the primary duty was one of restitution in kind, "or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear [together with] the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."⁹ The Court contrasted this with the obligation that Poland would have been under had this been a normal expropriation "to render which lawful only the payment of fair compensation would have been wanting."¹⁰ But this is not the only *dictum* on the point, for on the very next page the Court spoke of the obligation, in cases of lawful expropriation, to pay "the just price of what was expropriated" and "the value of the undertaking at the moment of dispossession, plus interest to the day of payment." "The just price of what was expropriated" and "the value of the undertaking" are phrases rather more consistent with full compensation than with a more flexible standard, especially bearing in mind the legal, political and economic assumptions of members of the Court, and of the legal systems they represented, in 1928. Moreover, it seems quite clear from the Judgment as a whole,¹¹ the separate opinions and the pleadings, that the

⁵ Schachter, *supra* note 3, at 122-23.

⁶ By "full" compensation, I mean the full value of the property assessed according to fair principles of valuation. For present purposes, the notion of "full" compensation and the Hull formula can be regarded as interchangeable; I shall not be dealing with the (often subsidiary) issues of the promptness and effectiveness of the compensation.

⁷ Case Concerning the Factory at Chorzów (Merits), 1928 PCIJ, ser. A, No. 17.

⁸ Schachter, *supra* note 3, at 123.

⁹ 1928 PCIJ, ser. A, No. 17, at 47.

¹⁰ *Id.* at 46.

¹¹ Including the instructions given for an expert inquiry by the Order issued simultaneously with the Judgment (*id.* at 99)—an Order whose significance in matters of valuation appears to have been largely overlooked by commentators.

Court considered that the *minimum* pecuniary obligation in all cases was the payment of the full value of the property taken; what distinguished unlawful from lawful takings was the *additional* obligation in the former case, if *restitutio in integrum* was impossible, to compensate for consequential loss. What the Court said and assumed about the standard of compensation for lawful takings may, strictly speaking, be *obiter*, but it has traditionally been regarded as the *locus classicus* on the subject and, for better or for worse, it supports a "full compensation" standard.

The only other case Professor Schachter refers to by name in this context is the *Norwegian Shipowners' Claims* arbitration of 1922.¹² Now, it is true that the Permanent Court of Arbitration in that case (Valloton, President; Anderson, Vogt) described the applicable standard as "just compensation"—a phrase which Professor Schachter himself favors; but what is significant for our purposes is that it was common ground between Norway and the United States that the appropriate standard was "just compensation" *in the sense in which that phrase is used in United States constitutional law*, and the tribunal so awarded.¹³ In the Fifth Amendment to the United States Constitution, as interpreted by the Supreme Court, "just compensation" means the full amount of a fair valuation based on the price a willing buyer would pay to a willing seller.¹⁴ The arbitral tribunal decided that the "fair market value" of the claimants' property should be paid, and treated "just," "full" and "fair" as virtually interchangeable notions so far as the standard of compensation was concerned.¹⁵ Whether or not the award supports the "prompt and effective" formula—which Professor Schachter questions but which is outside the scope of the present paper to discuss—it certainly does not support the view that "fair" compensation can be less than full.¹⁶

These are the only cases referred to by name in the relevant part of the Editorial Comment, but the author goes on to say that "[i]f we look for 'traditional' law in the earlier cases, such as those collected by Ralston in his classic work,¹⁷ we cannot find a single decision expressing the 'prompt, adequate and effective' compensation formula."¹⁸ Once again, whilst it may be literally true that (so far as I am aware) none of the cases adopts the actual words of the Hull formula, there are in fact several decisions of international arbitral tribunals, both before and after the *Chorzów* case, that require the payment of *full* compensation in cases of

¹² (Nor. v. U.S.), 1 R. Int'l Arb. Awards 307 (1922).

¹³ *Id.* at 332 and 339.

¹⁴ See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); and, for a recent example, *Kirby Forest Indus. v. United States*, 104 S.Ct. 2187 (1984).

¹⁵ 1 R. Int'l Arb. Awards at 339–42.

¹⁶ It should also be noted that the *Norwegian Shipowners' Claims* award was cited in oral argument in the *Chorzów Factory* case. 1928 PCIJ, ser. C, No. 15-II, at 161, 180.

¹⁷ J. H. RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* (rev. ed. 1926, supp. 1936).

¹⁸ Schachter, *supra* note 3, at 123.

otherwise lawful expropriation.¹⁹ Naturally, the tribunals were more concerned with the facts before them than with laying down broad principles applicable to a wide range of hypothetical circumstances, but this is normal practice and certainly does not warrant the inference that the general standard was regarded as flexible.²⁰ The consistency of the case law is not unimpressive,²¹ as a chronological survey will demonstrate.²²

The compensation provisions of Article 297 of the Treaty of Versailles were extended by the Treaty of Berlin of 1921 to the United States. Under Article 297, Germany was to pay "compensation" for damage to the "property, rights and interests" of Allied nationals caused by "exceptional war measures" or forced transfers. In *Administrative Decision No. III*,²³ the U.S.-Germany Mixed Claims Commission assumed for the purposes of its opinion that the property in question was taken in conformity with the laws of war but held, nevertheless, that Germany was obliged "to make full, adequate, and complete compensation or reparation for all losses sustained by American nationals" falling within the terms of the Treaty of Berlin, the value of the property to be assessed as "the reasonable market value of the property as of the time and place of taking . . . if it had such market value; if not, then the intrinsic value of the property as of such time and place."²⁴ And in the *Goldenberg* case, the sole arbitrator (Fazy), applying the same provision of the Treaty of Versailles, held that even in the case of lawful requisition, the property had to be "équitablement payés le plus rapidement possible," and that the payment of one-sixth of the market value of the property as of the date of taking amounted to a wrongful confiscation of the other five-sixths.²⁵

In the *Spanish Zones of Morocco* case, the sole arbitrator, Max Huber, held that "il peut être considéré comme acquis qu'en droit international un étranger ne peut être privé de sa propriété sans juste indemnité"²⁶

¹⁹ Including two in Ralston itself: the *De Sabla* and *Spanish Zones of Morocco* cases (discussed below).

²⁰ *Pace* Schachter, *supra* note 3, at 123.

²¹ In fairness, it should be pointed out that the *compromis d'arbitrage* in a particular case may have given the tribunal either a narrower or a wider discretion than that accorded by general international law (for instance, the *compromis* in the *Norwegian Shipowners' Claims* required the tribunal to decide the claims "in accordance with the principles of law and equity," 1 R. Int'l Arb. Awards at 310); but since those who are going to have to apply the law today are less likely to be the International Court of Justice than other arbitrators bound by similar terms of reference, or the parties themselves, this caveat should be seen in its proper perspective.

²² I have not included in this survey cases where, rightly or wrongly, there was a holding that the taking was unlawful under general or particular international law (e.g., the premature termination of a concession in the *Lighthouses Arbitration*, Claim No. 27, 23 ILR 299 (1956)); but it should be noted that in several of these cases it seems to have been assumed without discussion that full compensation was required even for lawful takings. See, e.g., *Upton Case* (U.S. v. Venez.), 9 R. Int'l Arb. Awards 234 (1903), a case where damages were awarded for the temporary taking of, and damage to, property.

²³ 7 R. Int'l Arb. Awards 64, 65 (1923).

²⁴ *Id.* at 66.

²⁵ (Germ. v. Roumania), 2 *id.* at 901, 909 (1928).

²⁶ *Id.* at 615, 647 (1925).

in the tribunal's view, the expropriating state had itself recognized—it held that the company was entitled to the depreciated replacement value of its fixed assets, together with compensation for loss of future profits.

Finally, there is the decision of Chamber Three of the Iran-United States Claims Tribunal in *American International Group, Inc. and American Life Insurance Co. v. Islamic Republic of Iran and Central Insurance of Iran*.³⁵ The claim arose out of the nationalization of the Iran America International Insurance Co. in 1979. The claimants relied upon both customary law and the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran of August 15, 1955. The respondents disputed the continuing validity of the Treaty and also its applicability to the case. In the event, the Tribunal concluded that it did not have to decide this question, in effect holding that, in a case of lawful nationalization, the standard of compensation was the same under customary law as under the Treaty. So far as customary law was concerned, the respondents further argued that "the traditionally asserted standard of 'prompt, adequate and effective' compensation . . . has been repudiated by modern developments in international law; instead, a standard of 'partial compensation' should be applied, based on references contained in resolutions of United Nations organs and from post-war settlement practice." They further contended that "even if the standard of compensation were held to be 'just' compensation for 'full value', it would be inappropriate and unreasonable to value the property as a going concern"; instead, they suggested a "net book value" approach.³⁶ The Tribunal rejected these submissions and held that the claimants were entitled to "the fair market value of the shares in Iran America at the date of nationalization"; it valued the company "as a going concern, taking into account not only the net book value of its assets but also such elements as good will and likely future profitability."³⁷

CONCLUSIONS

Interesting and important questions can be asked about the morality and expediency of different compensation standards. And even if we confine our discussion to the *lex lata*, it is not suggested that the present review is conclusive. Case law is far from being the only, or the most important, source of international law. An adequate account of the current general law on the subject would entail a comprehensive review of the

³⁵ 23 ILM 1 (1984). The Iranian arbitrator, Parviz Ansari Moin, refused to sign the award.

³⁶ *Id.* at 7.

³⁷ *Id.* at 9 and 11, respectively.

In the course of his concurring opinion, Richard M. Mosk rejected the suggestion that, in customary law, "less than full compensation can constitute appropriate compensation" (*id.* at 14, 19). See, to similar effect, the opinion of George H. Aldrich, concurring in Chamber Two's award on agreed terms in *ITT Industries, Inc. v. Islamic Republic of Iran*, 2 IRAN-U.S. CLAIMS TRIBUNAL REP. 349 (1983-I); but see also Dr. Shafeiei's note in reply to this opinion (*id.* at 356, 358).

state practice—including an assessment of the extent (if any) to which various General Assembly resolutions and patterns of treaty making in the postwar period may have affected a “traditional” standard. The writings of publicists and the possible relevance of general principles of law would also have to be taken into consideration. All these matters are beyond the scope of this paper. However, as Professor Schachter himself implicitly recognized, a correct interpretation of the case law is an important element in determining whether a “traditional” standard of full compensation for otherwise lawful state takings ever existed. My analysis suggests that, according to the case law at least, it did exist; and I would respectfully suggest that Professor Schachter’s account is in this respect erroneous or—due to its ambiguities—misleading.

M. H. MENDELSON*

COMPENSATION CASES—LEADING AND MISLEADING

Mr. Mendelson, like other lawyers accustomed to accepting the Hull formula of 1938 as traditional doctrine, is troubled by my comment on the cases often cited in support of that formula. Yet Mr. Mendelson concedes the truth of my observation that these cases (which affirm an obligation to compensate) contain no reference to the “prompt, adequate and effective” standard. Nor do the later cases adopt that standard. I see no reason why it is misleading or ambiguous to state this “literal” truth. On the contrary, it seems to me misleading to cite those decisions as if they approved the Hull formula.

The main point of Mr. Mendelson’s criticism is that the cases require payment of “full” compensation and do not support a “flexible” standard. He suggests that “[w]hilst the cases do not espouse the Hull formula in so many words,” they support the substance of that formula. However, his reasons for this conclusion do not stand up to analysis.

To begin with, Mr. Mendelson chooses to omit the “prompt” and “effective” components of the Hull standard. Since they have been treated as essential elements of the formula, one would suppose it important to determine whether they are required. Mr. Mendelson considers the main point of the Hull formula to be an absolute requirement of “full” compensation (he prefers “full” to “adequate”) and he argues that several cases support that requirement. But the cases he cites only show that the tribunals applied the criterion of fair market value (or its equivalent) and sometimes included an amount based on future earning prospects (the *lucrum cessans*). Not surprisingly, the tribunals considered their determination as providing “just” or “fair” compensation in the particular case.

* Fellow in Law, St. John’s College, Oxford. Although I am counsel for Vosper p.l.c. in a case arising out of the nationalization of the British aircraft- and ship-building industries in 1977, now pending in the European Court of Human Rights, the views expressed here are personal and responsibility for them is mine alone.

One might point to these decisions as indicating that those criteria have produced satisfactory results for the property owner. In that sense, they lend support to the draft *Restatement's* position and to the view I expressed inasmuch as the Hull formula was not applied.

More important, the cases do not support Mr. Mendelson's argument against what he calls a flexible standard. The fact that some decisions awarded "fair market value" cannot in itself show that the requirement is an absolute rule applicable in all circumstances. One may approve these decisions as just and reasonable, yet question the universal applicability of their standards of valuation to all cases of expropriation under all conditions. In fact, no decision asserts that the specific criteria of valuation applied in the case are universally applicable. On the contrary, the tribunals make it clear that their concern is with the particular facts of the case before them. Some, like the *AMINOIL-Kuwait* arbitral award, are explicit in emphasizing the limits imposed by the particular circumstances. None of the cases, old or new, can be plausibly invoked to support the claim that fair market value or full compensation is required in all cases. In short, the "case law" referred to by Mr. Mendelson simply does not sustain the absolute requirement that he considers the essential component of the Hull formula. What the cases show is that when a dispute over compensation for a particular taking reaches a court or arbitral tribunal, the property owner is quite likely to get fair market value and a satisfactory award even though the magic words of the Hull formula are not invoked. But in some cases, he may not receive that amount if, for example, his legitimate expectations did not warrant it or if his operations were contrary to accepted good practices and diminished the value of the property.¹

Moreover, the issue raised cannot be understood solely on the basis of adjudicated cases involving specific properties expropriated. It is equally pertinent to consider state practice and juristic opinion involving large-scale nationalization and special circumstances. Mr. Mendelson recognizes this but chooses not to refer to it in his present comment. But it would have been truly misleading if I had ignored the judgments of leading jurists in Western Europe and the United States as to the significant customary law rules in such cases. Many of them (as I indicated) deny that the Hull formula is a rule of general customary law and also deny that "full value" (or its equivalent) is an international requirement in all circumstances. The "old" *Restatement* of 1965 recognized that exceptions were acceptable in some situations,² as did Sohn and Baxter in their well-received draft on the subject.³ Hersch Lauterpacht, Charles De Visscher,

¹ See *Arbitration between Kuwait and American Independent Oil Co. [AMINOIL]*, Mar. 24, 1982, 21 ILM 976 (1982).

² RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§187-188 (1965).

³ Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AJIL 545, 560 (1961) ("less than full value would be just compensation when the state would otherwise have 'an overwhelming financial burden'").

Wolfgang Friedmann and others I cited have all pointed out that there is no absolute general rule of full compensation in every case.⁴

I do not believe that these conclusions impugn the validity of the standards of valuation used in the cases referred to by Mr. Mendelson. Those cases stand on their own feet; they do not require an absolute rule or the Hull formula to sustain them, nor, conversely, do they support either of those propositions. They show that foreign investors may get a fair award without asserting an absolute and inflexible rule. To carry on the debate in terms of the generalities of the Hull formula, with its negative historical and political overtones in many countries, does not serve the interests of investors or the countries concerned. It would be more useful for lawyers to continue the detailed analysis that some have undertaken of the specific factors and circumstances that bear on valuation and other relevant issues. I look forward to Mr. Mendelson's contribution along these lines.

OSCAR SCHACHTER*

⁴ See also 3 R. LILICH, *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 14-21 (1975); S. RUBIN, *PRIVATE FOREIGN INVESTMENT* 11-23 (1956).

The U.S. Supreme Court, in applying the standard of just compensation under the Fifth Amendment, said:

The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined.

United States v. Cors, 337 U.S. 325, 332 (1948).

* Of the Board of Editors.

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

March 1, 1985

We agree with the suggestion in your editorial¹ that the jurisdictional decision of the International Court of Justice in Nicaragua's case against the United States should be carefully considered by American international lawyers. We believe, however, that your editorial does not devote adequate attention to the reasons of the President for discontinuing participation in the case. We also take strong exception to your conclusion that none of the Court's jurisdictional findings is insupportable in fact or law.

The reasons behind the President's decision to participate no further in the case were set out by the Department of State on January 18.² Briefly put, the United States considers Nicaragua's claims to present "an inherently political problem that is not appropriate for judicial resolution."³ Nicaragua alleges, in essence, that there is a "threat to the peace, breach of the peace, or act of aggression"; the United States responds that its policy in Central America is an exercise of the inherent right of self-defense. This is a classic case arising under chapter VII of the United Nations Charter. Authority to make determinations of the points at issue is expressly vested in the Security Council, not the Court, by Articles 39 and 51, respectively. We regret that your editorial treats so lightly issues that go to the heart of the system established under the United Nations Charter.

Any examination of the Court's jurisdictional findings requires close attention to the pleadings and oral argument in the case. We believe that such scrutiny can only lead to the conclusion—contrary to that in your editorial—that the Court's finding of jurisdiction was clearly erroneous. A brief summary of our reasoning in this regard is set forth in the "Observations" on the Court's Judgment, also released by the Department of State on January 18.⁴

We are grateful to the Society for the opportunity to express our views.

DAVIS R. ROBINSON
Legal Adviser
U.S. Department of State

OBSERVATIONS ON THE INTERNATIONAL COURT OF JUSTICE'S NOVEMBER 26, 1984 JUDGMENT ON JURISDICTION AND ADMISSIBILITY IN THE CASE OF *NICARAGUA V. UNITED STATES OF AMERICA*

In a decision rendered on November 26, 1984, the International Court of Justice: (1) by a vote of 11–5 (U.S., U.K., FRG, Italian and Japanese

¹See p. 379 *supra*.

²See p. 439 *infra*.

³*Id.*

⁴The "Observations" are printed below as an appendix to this letter.

judges dissenting), found that Nicaragua and the United States had each validly accepted the Court's "compulsory jurisdiction" over Nicaragua's claims; (2) by a vote of 14-2 (U.S. and Argentine judges dissenting), found that a 1956 Treaty of Friendship, Commerce and Navigation (the "FCN Treaty") between Nicaragua and the United States also vested the Court with jurisdiction insofar as Nicaragua's claims arose under the FCN Treaty; (3) by integrating the 11-5 and 14-2 votes, held 15-1 that it had jurisdiction "to entertain the case"; and (4) by a vote of 16-0 (U.S. and U.K. judges expressing reservations), held that Nicaragua's claims were "admissible" (i.e., justiciable) because they were "not about an ongoing armed conflict" and thus did not present a dispute that, under the United Nations Charter, may be addressed only to the political organs of the United Nations.

Each of the Court's holdings ignores or seriously misstates the evidence and law relevant to the issues before the Court. In brief, the Court:

- Misconstrues the plain language of its own Statute.
- Overrules its own prior holdings on at least two dispositive issues—the meaning of the provision in the Court's Statute carrying over acceptances of the compulsory jurisdiction of the Permanent Court of International Justice to the present Court, and the necessity that a State comply with the legal requirements set forth in the Statute in order to accept the Court's compulsory jurisdiction.
- Ignores the terms and unequivocal legal implications of Nicaragua's own pleadings on two other issues—whether Nicaragua's claims present a dispute involving an ongoing armed conflict, and whether the Central American States other than Nicaragua will be affected by any decision in the case.
- Renders meaningless a reservation to the United States 1946 declaration excluding certain multilateral disputes from the United States acceptance of the Court's compulsory jurisdiction by deciding that the meaning and applicability of the reservation can be determined only after the case has been adjudicated on the merits.
- Ignores the overwhelming weight of evidence and legal authority on several key issues, although that evidence and authority were briefed by the parties in extensive detail.

I. THE COURT'S FINDING THAT NICARAGUA'S CLAIMS COME WITHIN ITS "COMPULSORY JURISDICTION"

A. *The Court's finding that Nicaragua had accepted the Court's compulsory jurisdiction*

Under the Court's Statute, a State may accept the Court's "compulsory jurisdiction" in one of two ways: a State may file a declaration with the Secretary-General of the United Nations (Article 36(2) and (4) of the Statute); or a State that had made a declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice that was "still in force" when the Charter of the United Nations came into force is "deemed" to have accepted the present Court's compulsory jurisdiction (Article 36(5)). Nicaragua had not filed a declaration with the Secretary-General under Article 36(2) and (4). An 11-5 majority of the Court found

that Nicaragua should be “deemed” to have accepted the Court’s jurisdiction pursuant to Article 36(5). Specifically, the majority found that a Nicaraguan declaration made in 1929 under the Permanent Court—although never effective for that Court because the Court’s constituent treaty, adherence to which was a legal precondition to the effectiveness of the declaration, had not been ratified by Nicaragua—became effective for the present Court through Nicaragua’s ratification, and the entry into force, of the United Nations Charter in 1945.

- The Court’s theory is impossible to reconcile with the plain, consistent texts of four of the five authentic languages of the Charter, which state that only declarations “still in force” in 1945 would have legal effect for the present Court. Nicaragua’s declaration was manifestly not “still in force” in 1945 since, by Nicaragua’s own admission, it had never been in force. The British judge correctly concludes that the plain text of the Court’s Statute indicates “beyond doubt” that Nicaragua cannot be deemed to have accepted the Court’s compulsory jurisdiction under Article 36(5). The majority seeks to circumvent this conclusion by relying entirely on a minor divergence in the French text and insisting that the divergence denotes “an intention to widen the scope of Article 36, paragraph 5.” In fact, the French delegation in San Francisco in 1945 explicitly said the change in the French text was “not substantive” and was *not* intended to depart from the other texts.

- The Court’s jurisdictional theory was explicitly rejected as “impossible” in an opinion by the Court’s own Registrar in 1955. The Court makes no reference to this opinion, although it was repeatedly discussed by the United States in its presentation of the case.

- The Court’s theory under Article 36(5) is directly contrary to all contemporaneous accounts of the UN Charter and to the published opinions of every scholar who has examined the issue, including the leading experts on the Permanent Court and the current Court. The Court’s opinion does not mention these authorities.

- The Court’s theory is flatly inconsistent with two prior decisions of the Court (the *Aerial Incident* and *Barcelona Traction* cases). The Court ignores the relevant parts of these decisions except to extract out of context quotations that are, in any event, irrelevant to the issue before the Court. Elsewhere, these decisions reject unequivocally the interpretation of the Court’s Statute relied upon by the Court in the Nicaraguan case.

- The Court’s theory can, in effect, be reduced to the view that certain provisions of the Court’s Statute were drafted specifically so that only one State—Nicaragua— would be deemed to consent to the Court’s compulsory jurisdiction for the first time by ratifying the Charter. The Court offers no evidence whatsoever supporting this conclusion.

- The Court ignores the fact that Nicaraguan diplomatic records contemporaneous with Nicaragua’s ratification of the United Nations Charter that examine the implications of Nicaragua’s ratification in considerable detail do not indicate that Nicaragua itself considered the Charter to bind Nicaragua to the Court’s compulsory jurisdiction.

- The Court also ignores the fact that the United States made its own declaration in 1946 on the explicit understanding, reflected in State Department and Senate Foreign Relations Committee documents, that Nicaragua was *not* among the States that had accepted the compulsory jurisdiction of the Permanent Court. Thus, Nicaragua's declaration was expressly understood by the United States as not being among those that were "still in force" upon the entry into force of the UN Charter.

- Nicaragua's Agent represented to the Court in April, 1984 both in a letter and in oral argument, that Nicaragua had, in fact, ratified the legal instruments necessary to accept the Permanent Court's jurisdiction in the 1930's. Nicaragua made no reference in its original pleadings or in the lengthy oral arguments in April to the UN Charter as binding Nicaragua to the new Court's compulsory jurisdiction in 1945. In later pleadings and arguments Nicaragua changed its legal theory and admitted that its representations to the Court in April were false. The majority of the Court does not mention these misrepresentations and fundamentally inconsistent shifts of legal theory by Nicaragua. The Court, moreover, accepts the attestations of Nicaragua's Agent that Nicaragua had complied in 1935 with all of the steps necessary under Nicaraguan law to permit Nicaragua's President or Foreign Minister to ratify the legal instruments necessary to accept the Permanent Court's compulsory jurisdiction; in fact, the only contemporaneous evidence before the Court proved exactly the opposite.

Ten members of the Court also found that, even if ratifying the Charter had not brought Nicaragua's 1929 declaration into force, Nicaragua's conduct since 1945 sufficiently demonstrates its consent to accept compulsory jurisdiction to satisfy the Court's Statute.

- In fact, before the case, no Nicaraguan official had *ever* stated that Nicaragua was bound by the jurisdiction of either the old or the new Court. United States diplomatic records clearly show that in 1943, 1955, and 1956 top Nicaraguan officials represented to the United States that Nicaragua did not consider itself bound. These records were the only evidence of Nicaragua's conduct presented to the Court and were un rebutted. Indeed, Nicaragua introduced documents from its files showing that it had been advised in 1956 by its own counsel to file a new declaration accepting the Court's jurisdiction because the 1929 declaration was not binding.

- In support of this theory of jurisdiction, the Court relies entirely on Nicaragua's failure to challenge Nicaragua's inclusion over the years in various lists of States that have accepted the Court's jurisdiction. The Court ignores the facts that (a) the publications in question specifically disclaim to be authoritative, and (b) the publications either include express qualifications of Nicaragua's status or are based on other publications with such qualifications.

- Furthermore, the listings on which the Court relies clearly state that they are predicated solely on Nicaragua's having brought its acceptance of the Permanent Court's compulsory jurisdiction into "force" by ratifying the necessary legal instruments in 1939—an action Nicaragua now admits it never took. Thus, the listings on

which the Court's decision rests are directly inconsistent with the legal theory of that decision—that Nicaragua became bound to the Court's compulsory jurisdiction only in 1945 when it ratified the UN Charter and the Charter came into force. For these reasons, British Judge Jennings described the Court's reliance on the listings as "startling."

- In the 1962 *Temple* case, the Court held that compliance with the procedures set forth in its Statute was mandatory in order for a State to accept the Court's compulsory jurisdiction. The Court acknowledges that Nicaragua did not comply with those procedures. The Court's decision thus can only be seen as overruling its holding in the *Temple* case that those procedures are, indeed, mandatory.

B. *The Court's finding that the United States had consented to jurisdiction over Nicaragua's claims*

(i) *The United States Multilateral Treaty Reservation.* In its 1946 declaration accepting the Court's compulsory jurisdiction, the United States excluded "disputes arising under a multilateral treaty, unless all parties to the treaties affected by the decision are also parties to the case before the Court." The United States did so because it did not wish to be bound by a treaty interpretation unless other affected parties to a dispute were similarly bound. The Court determined that it could decide whether any absent States would be "affected by" its judgment only after the case had been adjudicated on the merits and therefore refused to dismiss now Nicaragua's claims arising under multilateral treaties.

- The Court ignores the explicit representations of all four of the Central American States other than Nicaragua that they would, in fact, be affected by any decision of the Court in this case.

- The Court also ignores Nicaragua's own pleadings, which repeatedly name other Central American States and indisputably implicate them in Nicaragua's allegations against the United States.

- The Court, in effect, renders the United States multilateral treaty reservation a nullity since the very purpose of the reservation was to withhold consent to adjudication in the absence of interested treaty parties. The Court's ruling requires adjudication before jurisdiction may be decided under the reservation. The multilateral treaty reservation thus can never exclude adjudication of the merits of a case such as this, even though that was the purpose of the United States in making the reservation when it accepted the Court's compulsory jurisdiction in 1946.

(ii) *The United States Notice of April 6, 1984 indicating that the United States would not accept the Court's jurisdiction over Nicaragua's claims.* The Court (with the U.S., British, and Japanese judges strongly dissenting) found that the April 6 notice modifying U.S. acceptance of the Court's compulsory jurisdiction could only be effective after six months because the United States 1946 declaration contains a six-month termination clause. Although the April 6 notice did not "terminate" the United States declaration, the Court nevertheless held the termination clause applicable. The Court also said that the possibility that Nicaragua could terminate its own declaration (assuming it was valid) on shorter notice was entirely irrelevant and not

subject to the principle of reciprocity underlying all acceptances of the Court's compulsory jurisdiction.

- By binding the United States to its 33-year-old termination clause, the Court's holding ignores intervening State practice and hence customary international law. Indeed, the Court does not even examine that practice in reaching its decision. The Japanese judge in his separate opinion says he is "astonished" at the holding because "it seems that the Court is quite unaware of the development of the Optional Clause during the past decades. . . ." In particular, the Court ignores the fact that a number of States have modified their declarations with immediate effect in order to avoid jurisdiction and that States have been allowed to withdraw from the United Nations entirely on only 24 hours notice.

- The most analogous case on this issue was the *Right of Passage* case between India and Portugal, in which the Court closely examined the nature of declarations accepting the Court's jurisdiction and the right of States to modify those declarations. The United States explained in great detail in both its written and oral pleadings why the logic of that decision required the Court to give effect to the April 6 notice. The Court does not mention the decision or the United States arguments.

- The Court's holding also attributes a limitation on Nicaragua's right to terminate its own 1929 declaration; no such limitation appears in the declaration, nor is such a limitation supported by State practice.

- The Court holds that, even were Nicaragua able to terminate its declaration without notice, the United States would still be unable to exercise the same right on the basis of reciprocity—even though reciprocity is the fundamental principle underlying the Court's jurisdiction generally and was an explicit condition to the United States acceptance of the Court's compulsory jurisdiction in 1946.

II. THE COURT'S FINDING OF JURISDICTION UNDER THE FCN TREATY

The Court noted that the 1956 FCN Treaty has a clause permitting referral to the Court of disputes under the Treaty "not satisfactorily adjusted by diplomacy," and held that it has jurisdiction to determine whether any of Nicaragua's claims are violations of the Treaty. (The resulting jurisdiction would be much narrower than the general "compulsory jurisdiction" of the Court's first theory.)

- Nicaragua did not cite the FCN Treaty in its original pleading despite explicit requirements in the Court's rules and precedents indicating that all jurisdictional bases have to be specified at the outset. Further, Nicaragua failed even to discuss the Treaty in nearly eight hours of oral argument in April and nearly eight hours of additional argument in October. The Court thus relied upon a jurisdictional basis that Nicaragua itself cannot be considered to have argued seriously.

- The jurisdictional clause of the FCN Treaty by its terms only applies to disputes "not satisfactorily adjusted by diplomacy," and Nicaragua had never raised the question of Treaty violations in

diplomatic discussions with the United States. The Court dismissed this objection, interpreting the Treaty, despite its plain language, not to require *any* efforts at diplomatic resolution before a party may apply unilaterally to the Court.

- The FCN Treaty on its face deals entirely with commercial matters in the treatment of one country's nationals in the territory of the other; it has nothing to do with allegations about the use of force. This is confirmed by an exclusionary clause in the Treaty providing that it "shall not preclude the application of measures regulating traffic in arms or necessary to protect a party's essential security interests." The Court ignores all of these provisions even though they were fully briefed by the United States and Nicaragua did not contest the U.S. interpretation.

III. THE COURT'S HOLDING THAT THE CASE IS ADMISSIBLE

The Court rejected several arguments by the United States that Nicaragua's claims were inadmissible (i.e., non-justiciable), most notably the United States argument that disputes of this nature are entrusted by the United Nations Charter to the political organs of the UN, not the Court.

- The United States adduced extensive evidence and expert opinion demonstrating that the drafters and signatories of the United Nations Charter envisioned that disputes of this nature would be resolved by the political organs of the UN. The Court ignored this evidence and cited no evidence whatsoever indicating that the drafters or the signatories of the Charter considered the Court an appropriate forum for such disputes.

- Nicaragua specifically stated in its pleadings that its claims before the Court were identical to those it had made before the Security Council alleging that United States actions were a "threat to the peace, breach of the peace, or act of aggression"—language taken verbatim from Article 39 of the Charter, which vests the authority to make such determinations exclusively in the Security Council. Nicaragua reiterated this claim at great length over many hours of oral hearings. The Court simply ignored the terms of Nicaragua's own pleadings and oral argument and decided that the Nicaraguan complaint was "not about an ongoing armed conflict."

- The Court cited the *Corfu Channel* and *Aerial Incident* cases as establishing the Court's competence to determine the lawfulness of an alleged use of armed force. The United States pointed out that neither of those cases involved an alleged use of force that was actually in progress, so as to engage the competence of the Security Council under the Charter. The Court dismissed this crucial distinction only by stating that it was "not relevant."

- Article 51 of the Charter provides that nothing in the Charter, short of Security Council action, shall impair the inherent right of States to individual and collective self-defense. The Security Council, five days before Nicaragua filed its case with the Court, declined to grant Nicaragua the same relief it requested from the Court. Although both governments admitted in their pleadings that claims to self-defense were central to the case, the Court ignored Article 51 and

its express prohibition of action to limit the right of self-defense by United Nations organizations other than the Security Council.

- The Court relied heavily on the Iran *Hostages* case in claiming the competence to adjudicate a situation of alleged ongoing armed hostilities. The Court ignored the facts that in the *Hostages* case: (a) no question of an ongoing unlawful use of force was before the Court; (b) the issues before the Court were entirely distinct from those before the Security Council so that the Court could pass upon the narrow legal claims of the United States without in any way interfering with a matter before the Council; and (c) Iran had specially consented, in various international agreements, to have the questions before the Court submitted to the Court in the event of a dispute. All these factors were dealt with in detail in the United States written and oral pleadings; the Court's November 26 judgment does not respond to them.

- The Court made light of the extraordinary evidentiary problems presented by the case: the absence from the case of many of the parties directly involved, namely, the other Central American States and the various insurgents, including both those in Nicaragua and those supported by Nicaragua in the territories of its neighbors; the constantly shifting facts in related, ongoing armed conflicts within or across the borders of several countries and in difficult terrain; and the obvious unwillingness or inability of some parties to disclose to a court evidence that would compromise their intelligence sources in the very midst of an armed conflict.

- The essence of the Court's ruling is that it may preside over ongoing armed hostilities, assessing relative fault and directing the parties on the proper use of force in the midst of the hostilities, in the midst of negotiations among the parties to the hostilities, and despite Security Council oversight.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

ALIENS

(U.S. *Digest*, Ch. 3, §3)

Agreement for Return of Mariel Cubans

By a joint communiqué issued December 14, 1984, the United States and Cuba set out the terms of an agreement on the return to Cuba of 2,746 named Cuban nationals who had come to the United States in 1980 during the boatlift from the port of Mariel and who had been found ineligible for entry because they had committed serious crimes in Cuba or the United States or suffered from severe mental disorders. The agreement provided for returns at the rate of 100 for each calendar month, with no more than 150 returns to be effected in any one calendar month.

The United States agreed on its part to resume issuance of preference immigrant visas to Cuban nationals residing in Cuba up to the number of 20,000, in particular to close family relatives of United States citizens and of Cuban permanent resident aliens in the United States. In addition, the United States will continue granting immigrant visas to Cuban residents who are parents, spouses or unmarried children under 21 years of age of United States citizens, without regard to the annual 20,000 limit. The United States expressed its willingness to "implement—with the cooperation of Cuban authorities—all necessary measures to ensure that Cuban nationals residing in Cuba who wish to emigrate to the United States and who qualify under United States law to receive immigrant visas" might enter the United States, up to the stated figure of 20,000 immigrants per year. The United States stated, further, that measures were being taken so that the (other) Cuban nationals who came in the Mariel exodus might acquire, beginning immediately and with retroactive effect of approximately 30 months, legal status as permanent resident aliens.

The United States agreed to facilitate admission of persons (as well as their immediate family members) who, having been released after serving sentences for acts defined by Cuban penal legislation as "offenses against the Security of the State" (i.e., ex-political prisoners), wished to reside permanently in the United States. Necessary steps had been taken, the communiqué stated, to admit up to three thousand such persons, including

* Office of the Legal Adviser, Department of State.

immediate family members, during fiscal year 1985, with the size of the program and any possible future increase to be determined in the light of experience and the desire expressed by both sides to allow ongoing implementation of the program until completion.¹

FISHERIES

(U.S. *Digest*, Ch. 7, §4)

U.S.-Canada Treaty on Pacific Salmon

Representatives of the United States and the Canadian Governments on January 28, 1985 signed at Ottawa a Treaty Concerning Pacific Salmon, with annexes and Memorandum of Understanding, that concluded negotiations of nearly 15 years' duration. The purpose of the Treaty is to establish a framework for long-term bilateral cooperation in the Pacific Northwest, Alaska and Canada in salmon management, research and "enhancement," defined as meaning "man-made improvements to natural habitats or application of artificial fish culture technology that will lead to the increase of salmon stocks."

Upon entry into force, the Treaty would remain in effect for at least 3 years, after which either party might give 1 year's notice of termination. It would supersede the 1930 Convention between the United States and Canada for the Protection, Preservation, and Extension of the Salmon Fishery of the Fraser River System.¹ The Treaty would transfer the responsibilities of the International Pacific Salmon Fisheries Commission under the 1930 Convention, as amended, to the Pacific Salmon Commission, to be established by the parties, the Fraser River Panel and the Government of Canada.

The Pacific Salmon Commission provided for by Article II of the Treaty is to have oversight over "intercepting" salmon fisheries within the two countries, i.e., those harvesting fish that spawn in the other country's waters. The Commission, the seat of which is to be at New Westminster, British Columbia, will be composed of a United States and a Canadian section, each with not more than four Commissioners and four alternates. The Commission Chairman is to be selected by one section and the Vice-Chairman by the other, with the positions to alternate annually between the sections. Commission decisions or recommendations require the approval of both sections. Article II also provides that the Commission shall establish bilateral panels, composed of not more than six members from each party, for specific fishery regimes; areas of jurisdiction for the Northern and Southern Panels are described in Annex I to the Treaty, those for the Fraser River Panel in Annex II. The panels

¹ See further 77 AJIL 875-76 (1983), and 75 AJIL 144-45 (1981).

¹ May 26, 1930, TS No. 918, 50 Stat. 1355 (entered into force July 28, 1937), as amended, Dec. 28, 1956, TIAS No. 3867, 8 UST 1057, and Feb. 24, 1977, TIAS No. 9854, 32 UST 2475.

are to furnish information and make recommendations regarding their fishery regimes, and carry out such other functions as the Treaty specifies or as the Commission may direct. Panel decisions and recommendations, like those of the Commission, must be approved jointly.

Panels in turn would receive information and recommendations from Commission-established joint technical committees and each party. Each party would promulgate approved regulations to implement fishing regimes. Additionally, in the case of the fisheries for Fraser River sockeye and pink salmon, some in-season regulatory authority is vested in the Fraser River Panel.

Two main principles govern the Treaty. As set out in Article III(1), they are, first, to "prevent overfishing and provide for optimum production," and second, to "provide for each Party to receive benefits equivalent to the production of salmon originating in its waters." This second principle, the so-called equity principle, is intended to provide for each party to receive compensation benefits of unspecified form or quantity for fish harvested by one party but originating in the waters of the other. To implement the equity obligations, the Commission is to ascertain the value of each party's production of stocks that are intercepted by the other party. United States officials anticipate that this calculation will consider, among other factors, numbers of fish that are intercepted, their size and growth potential, and their value. To the extent that the Commission is able to ascertain that the levels of interception by each party are not equivalent, it would be expected that within the Commission the parties would develop a phased program to adjust and compensate for the inequity.

The Commission has three guidelines for implementation of the twin principles of conservation and equity (Article III(3)). First, the Commission is admonished to recognize the "desirability in most cases of reducing interceptions." Second, the Commission is directed to recognize the desirability of avoiding economic and social dislocation of existing fisheries, some with long-settled expectations and historic claims. This guideline affords important protection for historic fisheries that the parties do not intend to terminate, despite the fact that these fisheries necessarily intercept salmon. Third, the Commission is to consider annual variations in abundance of the stocks.

Article IV concerns the conduct of the fisheries and sets out the procedures to be followed to establish annual fishery regimes. Each party is to submit to the other party and to the Commission a report that will include basic statistics on each fishery: run size, spawning escapement (except for transboundary rivers, where under Article VII the appropriate panel is to perform this task), estimated total allowable catch, stock interrelationships, management and, as appropriate, domestic allocation objectives. The Commission is to solicit panel views on the report and recommend fishery regimes to the parties. On adoption by the parties, these regimes are to be promulgated as chapters to Annex IV of the Treaty and implemented by domestic federal, state and tribal management

authorities. Each party is to notify the other party and the Commission of regulations and in-season modifications.

Under Article IV, each party is to establish and enforce the regulations to implement the regime, except in the case of the Fraser River regime, for which Article VI establishes different procedures.

Article IV is complemented by Annex IV to the Treaty, which prescribes specific fishery regimes, including initial harvest limits and escapement allocations for named transboundary rivers. Chapter 7 of Annex IV places upon the parties a general obligation with respect to intercepting fisheries not dealt with elsewhere: unless otherwise agreed, not to initiate new intercepting fisheries or to conduct or redirect fisheries in a manner that intentionally increases interceptions. (Annex IV is subject to amendment, as are the other Annexes, in accordance with Article XIII of the Treaty, through an exchange of notes between the two Governments that would not be subject to Senate advice and consent.)

The Treaty recognizes in Article VIII that arrangements for consultation, recommendation of escapement targets and approval of enhancement activities on the Yukon River require further development "to take into account the unique characteristics of that River." The parties commit themselves to conclude as soon as possible negotiations to develop cooperative management procedures and develop an organizational structure to deal with Yukon River issues, *inter alia*.

Article X provides that the parties shall conduct research to investigate migratory and exploitation patterns, productivity and status of stocks of common concern and the extent of interceptions. Subject to normal requirements, each party must allow the other party's nationals, equipment and vessels conducting Commission-approved research to have access to its waters for such purpose. Under Article XI, the Treaty is not to be interpreted or applied so as to affect or modify existing aboriginal rights or rights established in existing Indian treaties and other existing federal laws.

Article XII provides for a Technical Dispute Settlement Board with jurisdiction over disputed estimates of the extent of salmon interceptions and data related to overfishing, as well as other technical matters referred to by the Chairman.

Under Article XIV of the Treaty, each party must (a) enact and enforce necessary implementing legislation; (b) require reports from its nationals and vessels of catch, effort and related data for all stocks subject to the Treaty and make such data available to the Commission; and (c) exchange fisheries statistics and any other relevant information on a current and regular basis.²

ENVIRONMENTAL AFFAIRS

(U.S. *Digest*, Ch. 11, §1)

Whaling—Packwood-Magnuson and Pelly Amendments

Under an exchange of letters between Secretary of Commerce Malcolm Baldrige and Minister Yasushi Murazumi, *Chargé d'Affaires ad interim* of

² S. TREATY DOC. NO. 2, 99th Cong., 1st Sess. (1985).

Japan at Washington, dated November 13, 1984, the United States undertook that the Secretary of Commerce would refrain from "certifying," pursuant to the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976¹ and the Pelly Amendment to the Fishermen's Protective Act of 1967,² that specified commercial harvests of whales by Japanese nationals for limited periods therein set out diminished the effectiveness of the 1946 International Convention for the Regulation of Whaling or its conservation program.³

The catch limits exceeded a zero catch limit adopted on July 25, 1981 by the International Whaling Commission as to all sperm whale stocks, beginning in 1981, except the Western Division stock of the North Pacific (taken exclusively by Japanese whalers), from which no whales might be taken until catch limits, including any limitations on size and sex, had been established by the Commission (see footnote 1 to table 3 of the Schedule to the Convention). The catch limits also exceeded the zero catch limit on commercial whaling from all stocks (the moratorium), adopted by the Commission on July 24, 1982, to begin with the 1986 coastal season and the 1985/1986 pelagic season, subject to review.⁴ (Under Commission practice, a coastal whaling season is referred to only by the year in which it begins, even though it may last into the following year; a pelagic whaling season is designated by the years in which it actually occurs.)

¹ The Packwood-Magnuson Amendment (sec. 3 of Pub. L. No. 96-61, Aug. 15, 1979, 93 Stat. 407) to the Magnuson Fishery Conservation and Management Act of 1976 (16 U.S.C. §1801 *et seq.* (1982)) was specifically directed toward the protection of whales. Section 3(a) of Pub. L. No. 96-61 added to §201 (foreign fishing) of the Act new paragraphs that provide for a reduction by not less than 50 percent in each fishery allocation within the U.S. 200-nautical-mile fishery conservation zone for a foreign country whose nationals the Secretary of Commerce certifies to be, directly or indirectly, conducting fishing operations or engaging in trade or taking that diminishes the effectiveness of the International Convention for the Regulation of Whaling (see note 3 *infra*). Under sec. 201(e)(2)(A)(i), 16 U.S.C. §1821(e)(2)(A)(i), such certification shall also be deemed a certification for the purpose of sec. 8 of the Fishermen's Protective Act (the Pelly Amendment, note 2 *infra*), 22 U.S.C. §1978. The certified nation is permitted up to 1 year to remedy the conditions leading to the certification before its fishing allocation is completely terminated.

² The Pelly Amendment to the Fishermen's Protective Act of 1967, §8 thereof, was enacted by Pub. L. No. 92-219, Dec. 23, 1971, 85 Stat. 786, 22 U.S.C. §1978. It authorizes the President, upon certification from the Secretary of Commerce, to embargo imports of fish products from a foreign country whose nationals are diminishing the effectiveness of an international fishery conservation program. The Pelly Amendment has played a major role in U.S. efforts to persuade other nations to observe international fishery conservation programs, including whaling quotas.

³ The International Convention for the Regulation of Whaling, with Schedule of Whaling Regulations, Dec. 2, 1946, TIAS No. 1849, 62 Stat. 1716, entered into force for the United States Nov. 10, 1948. The Protocol to the Convention, Nov. 19, 1956, TIAS No. 4288, 10 UST 952, entered into force for the United States May 4, 1959. For reference to the numerous amendments to the Schedule of Whaling Regulations, see *Treaties in Force, Treaties and Other International Agreements of the United States*, published annually as of Jan. 1 by the Department of State.

⁴ The moratorium adopted by the International Whaling Commission on July 24, 1982 as paragraph 10(e) of the Schedule to the Convention reads:

Attached to Minister Murazumi's letter and forming part of the agreement was a "Summary of Discussions on Commercial Sperm Whaling in the Western Division Stock of the North Pacific, November 1-12, 1984, Washington, D.C." between Dr. John V. Byrne, United States Commissioner to the International Whaling Commission and formerly Administrator of the National Oceanic and Atmospheric Administration in the Department of Commerce, and Mr. Hiroya Sano, Director-General, Fisheries Agency, of the Japanese Ministry of Agriculture, Forestry and Fisheries. The Summary of Discussions set out the arrangements for Japan to cease commercial sperm, minke and Bryde's whaling following the 1987 coastal season and commercial pelagic whaling following the 1986/1987 pelagic season.

Japan agreed to consider withdrawal by December 13, 1984, effective on or before April 1, 1988, of an objection that, pursuant to Article V, paragraph 3 of the Convention, it had lodged on November 9, 1981, to the Commission's 1981 catch limit decision, specifically to footnote 1 to table 3 of the Schedule. (In 1982 the Commission had agreed to allow exceptional takings of 450 and 400 sperm whales from the Western Division stock of the North Pacific in the 1982 and 1983 coastal seasons, respectively, but had not permitted any takings thereafter. Under footnote 2 to table 3, notwithstanding the catch limits permitted for the 1982 and 1983 coastal seasons, the by-catch of females could not exceed 11.5 percent, and all whaling operations for the species were to cease for the rest of each season when the by-catch had been reached.) By lodging its objection to the 1981 catch limit on sperm whales, pursuant to Article V, paragraph 3 of the Convention, Japan had relieved itself of the obligation to observe the Commission's decision and could continue to whale in excess of the zero quota without being in violation of the Convention. Under its agreement with the United States of November 13, 1984, if Japan withdrew its objection by December 13, 1984, then the United States would not consider that sperm whaling catches by Japan during the 1984 and 1985 coastal seasons (set at 400 sperm whales during each season, subject to the provision on by-catch of females) diminished the effectiveness of the International Convention for the Regulation of Whaling

(e) Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.*

* The Governments of Japan, Norway, Peru and the Union of Soviet Socialist Republics lodged objection to paragraph 10(e) within the prescribed period. For all other Contracting Governments this paragraph came into force on 3 February 1983.

Peru withdrew its objection on 22 July 1983.

The objections of Japan, Norway, and the Union of Soviet Socialist Republics not having been withdrawn, the paragraph is not binding upon these Governments.

International Whaling Commission, Schedule to International Convention for the Regulation of Whaling, 1946, as amended by the Commission at the 35th Annual Meeting, July 1983, and replacing that dated February 1983, at 13 (1983).

or its conservation program. The Secretary of Commerce would therefore not certify such sperm whaling pursuant to the Packwood-Magnuson or Pelly Amendments.

In addition, under the agreement with the United States dated November 13, 1984, if Japan withdrew its objection to paragraph 10(e) of the Schedule (lodged on November 10, 1982) by April 1, 1985, so that Japanese commercial coastal whaling would cease following the 1987 coastal season and Japanese commercial pelagic whaling would cease following the 1986/1987 pelagic season, the United States would not consider that the whaling specified in the interim would diminish the effectiveness of the International Whaling Convention or its conservation program. The Secretary of Commerce would therefore not certify such whaling under the Pelly Amendment or the Packwood-Magnuson Amendment, if the whaling were limited to certain species and catch limits specified in the agreement or acceptable to the United States after consultation with Japan.

Minister Murazumi requested that, as long as Japanese commercial whaling was conducted in accordance with the arrangement set forth in the Summary of Discussions, the Secretary of Commerce not consider that it would diminish the effectiveness of the International Whaling Convention or its conservation program and that he not certify such whaling as provided for under either the Pelly or the Packwood-Magnuson Amendment. In his reply, Secretary Baldrige responded favorably to both requests, stating in part:

After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvests of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes. Moreover, in deciding that Japanese commercial whaling in accordance with paragraph 2 of that Summary of Discussions would not thwart the essential conservation purposes of the IWC, I have noted the apparent purpose of the IWC in having itself provided for a delayed effective date of paragraph 10(e) [i.e., the moratorium].

This arrangement does not insulate from certification any Japanese whaling in excess of the 1984-85 quota for Southern Hemisphere minke whales. I urge that the Government of Japan comply with that quota. Furthermore, the withdrawals of your government's objections to footnote 1 to Table 3 and paragraph 10(e) of the Schedule would be irrevocable, notwithstanding their prospective effective dates.



Finally, in judging whether the Government of the United States would accept the catch limits for the 1986 and 1987 coastal seasons and 1985/86 and 1986/87 pelagic seasons as contemplated in paragraph 2 of the Summary of Discussions, the Government of the United States would be guided by the most recent quota voted by the IWC prior to those seasons.

Our purpose in recent consultations with the Government of Japan has been to encourage adherence by the Government of Japan to all provisions of the Convention's Schedule. We regard the provisions of paragraph 10(e) of the Schedule to be of central importance to the rational conservation and management of the world's remaining whale stocks. This is reflected in President Reagan's 1981 letter to each of the IWC Commissioners encouraging them to take action along the lines now reflected in paragraph 10(e) of the Schedule.⁵

On March 5, 1985, in *American Cetacean Society v. Baldrige* (Civ. No. 84-3414 (D.D.C.)), Judge Charles R. Richey, finding the statutory obligations to be "peremptory" and not discretionary, permanently enjoined Secretaries Baldrige and Shultz from agreeing not to certify Japanese sperm whaling in violation of the IWC quota and from failing to reduce Japan's fishing allocation in consequence thereof. On March 8, the Department of Justice filed notice of appeal and moved for a stay of Judge Richey's order, which he denied on March 13. On the next day, the Department filed an emergency motion for a stay pending appeal (Civ. No. 85-5251 (D.C. Cir.)).

THE INTERNATIONAL COURT OF JUSTICE

(U.S. *Digest*, Ch. 13, §3)

U.S. Withdrawal from Proceedings Initiated by Nicaragua

On January 18, 1985, the Department of State announced President Reagan's decision that the United States would not participate in further proceedings in the case brought by Nicaragua against the United States before the International Court of Justice on April 9, 1984 (*Military and Paramilitary Activities in and against Nicaragua*).

A formal notification of U.S. withdrawal from the case, delivered on behalf of the Agent of the United States, Davis R. Robinson, Legal Adviser of the Department of State, to the Registrar of the Court, Santiago

⁵ Dept. of State File No. P85 0009-1595, in response to *id.*, No. P85 0009-1590.

On Dec. 11, 1984, the Government of Japan notified the International Whaling Commission by telex of the withdrawal of its objection to footnote 1 of table 3 of the Schedule to the International Convention for the Regulation of Whaling. See Circular Communication from Dr. Ray Gambell, Secretary of the Commission, to Contracting Governments, No. RG/DVR/A1627, Dec. 13, 1984, attaching (confirmatory) note, Ambassador of Japan (at London) to the Secretary of the International Whaling Commission, No. FCO/266/84, Dec. 11, 1984, found also at Dept. of State File Nos. P85 0009-1600 and 1601.

Torres Bernárdez, at The Hague on the same day, follows in pertinent part:

I have the honor to refer to the case of *Nicaragua v. United States of America*, and in particular to the judgment rendered by the Court on 26 November 1984 on the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of Nicaragua's application.

The United States has given the deepest and most careful consideration to the aforementioned judgment, to the findings reached by the Court, and to the reasons given by the Court in support of those findings. On the basis of that examination, the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings, that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims.¹

A background explanation of the United States decision was released by the Department of State in connection with the public announcement. The statement concluded with a discussion of the longer term implications of the decision, including, among other things, "clarification" of the U.S. acceptance of the Court's compulsory jurisdiction in 1946.

The Role of the International Court of Justice

The conflict in Central America, therefore, is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means—not through a judicial tribunal. The International Court of Justice was never intended to resolve issues of collective security and self-defense and is patently unsuited for such a role. Unlike domestic courts, the World Court has jurisdiction only to the extent that nation-states have consented to it. When the United States accepted the Court's compulsory jurisdiction in 1946, it certainly never conceived of such a role for the Court in such controversies. Nicaragua's suit against the United States—which includes an absurd demand for hundreds of millions of dollars in reparations—is a blatant misuse of the Court for political and propaganda purposes.

As one of the foremost supporters of the International Court of Justice, the United States is one of only 44 of 159 member states of the United Nations that have accepted the Court's compulsory jurisdiction at all. Furthermore, the vast majority of these 44 states

¹ Dept. of State to the American Embassy at The Hague, telegram No. 017113, Jan. 18, 1985.

For the Court's Judgment of Nov. 26, 1984, see *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 ICJ REP. 392, reprinted in 24 ILM 59 (1985).

have attached to their acceptance reservations that substantially limit its scope. Along with the United Kingdom, the United States is one of only two permanent members of the UN Security Council that have accepted that jurisdiction. And of the 16 judges now claiming to sit in judgment on the United States in this case, 11 are from countries that do not accept the Court's compulsory jurisdiction.

Few if any other countries in the world would have appeared at all in a case such as this which they considered to be improperly brought. Nevertheless, out of its traditional respect for the rule of law, the United States has participated fully in the Court's proceedings thus far, to present its view that the Court does not have jurisdiction or competence in this case.

The Decision of November 26

On November 26, 1984, the Court decided—in spite of the overwhelming evidence before it—that it does have jurisdiction over Nicaragua's claims and that it will proceed to a full hearing on the merits of these claims.

This decision is erroneous as a matter of law and is based on a misreading and distortion of the evidence and precedent:

—The Court chose to ignore the irrefutable evidence that Nicaragua itself never accepted the Court's compulsory jurisdiction. Allowing Nicaragua to sue where it could not be sued was a violation of the Court's basic principle of reciprocity, which necessarily underlies our own consent to the Court's compulsory jurisdiction. On this pivotal issue in the November 26 decision—decided by a vote of 11-5—dissenting judges called the Court's judgment “untenable” and “astounding,” and described the US position as “beyond doubt.” We agree.

—El Salvador sought to participate in the suit to argue that the Court was not the appropriate forum to address the Central American conflict. El Salvador declared that it was under armed attack by Nicaragua and, in exercise of its inherent right of self-defense, had requested assistance from the United States. The Court rejected El Salvador's application summarily—without giving reasons and without even granting El Salvador a hearing, in violation of El Salvador's right and in disregard of the Court's own rules.

The Court's decision is a marked departure from its past, cautious approach to jurisdictional questions. The haste with which the Court proceeded to a judgment on these issues—noted in several of the separate and dissenting opinions—only adds to the impression that the Court is determined to find in favor of Nicaragua in this case.

For these reasons, we are forced to conclude that our continued participation in this case could not be justified.

In addition, much of the evidence that would establish Nicaragua's aggression against its neighbors is of a highly sensitive intelligence character. We will not risk US national security by presenting such sensitive material in public or before a Court that includes two judges from Warsaw Pact nations. This problem only confirms the reality that such issues are not suited for the International Court of Justice.

Longer-Term Implications of the Court's Decision

The Court's decision raises a basic issue of sovereignty. The right of a state to defend itself or to participate in collective self-defense against aggression is an inherent sovereign right that cannot be compromised by an inappropriate proceeding before the World Court.

We are profoundly concerned also about the long-term implications for the Court itself. The decision of November 26 represents an overreaching of the Court's limits, a departure from its tradition of judicial restraint, and a risky venture into treacherous political waters. We have seen in the United Nations, in the last decade or more, how international organizations have become more and more politicized against the interests of the Western democracies. It would be a tragedy if these trends were to infect the International Court of Justice. We hope this will not happen, because a politicized Court would mean the end of the Court as a serious, respected institution. Such a result would do grievous harm to the goal of the rule of law.

These implications compel us to clarify our 1946 acceptance of the Court's compulsory jurisdiction. Important premises on which our initial acceptance was based now appear to be in doubt in this type of case. We are therefore taking steps to clarify our acceptance of the Court's compulsory jurisdiction in order to make explicit what we have understood from the beginning, namely that cases of this nature are not proper for adjudication by the Court.

We will continue to support the International Court of Justice where it acts within its competence—as, for example, where specific disputes are brought before it by special agreement of the parties. One such example is the recent case between the United States and Canada before a special five-member Chamber of the Court to delimit the maritime boundary in the Gulf of Maine area. Nonetheless, because of our commitment to the rule of law, we must declare our firm conviction that the course on which the Court may now be embarked could do enormous harm to it as an institution and to the cause of international law.²

² Dept. of State File No. P85 0009-2151, and N.Y. Times, Jan. 19, 1985, at 4, cols. 1-6 (N.Y. ed.).

JUDICIAL DECISIONS

MONROE LEIGH

Jurisdiction—U.S.-Nicaragua FCN Treaty—Article 36 of the ICJ Statute—nature and effect of reservations

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA V. UNITED STATES OF AMERICA). 1984 *ICJ Reports* 392. International Court of Justice, November 26, 1984.

On April 9, 1984, the Republic of Nicaragua filed an application with the International Court of Justice (ICJ) alleging that the United States had violated customary and conventional international law by engaging in and supporting insurgent military and paramilitary activities against the Government of Nicaragua. Three days before the application was filed, on April 6, 1984, the United States notified the Secretary-General of the United Nations that the U.S. declaration recognizing the compulsory jurisdiction of the Court "shall not apply to disputes with any Central American State or arising out of or related to events in Central America."

Before the Court, the United States argued that the April 6 notification had legally withdrawn the dispute from the Court's jurisdiction. Moreover, the United States asserted that the Nicaraguan Government had never accepted the compulsory jurisdiction of the Court and therefore lacked standing to invoke the Court's compulsory jurisdiction. In a controversial decision consisting of a majority opinion, seven separate opinions and one dissent (Schwebel, J.), the ICJ *held*: that it possessed jurisdiction over the case based on Article 36 of the Statute of the Court¹ and Article XXIV of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua;² that the April 6 notification from the United States, purportedly withdrawing the dispute from the compulsory jurisdiction of the Court, was ineffective; and that Nicaragua had standing to bring its claim.

The Court first considered whether Nicaragua was entitled to invoke the compulsory jurisdiction of the Court in the present dispute. Article 36, paragraph 2 of the ICJ Statute states:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

¹ The Statute of the International Court of Justice, annexed to the Charter of the United Nations, is set forth in 59 Stat. 1055 (1945), TS No. 993, at 25, and hereinafter will be referred to as ICJ Statute.

² Jan. 21, 1956, 9 UST 449, TIAS No. 4024.

At no time has Nicaragua formally recognized the compulsory jurisdiction of the ICJ under Article 36, paragraph 2. However, paragraph 5 of Article 36 states that a declaration made under the Statute of the Permanent Court of International Justice (PCIJ)—the predecessor of the ICJ—and “still in force” at the time the ICJ was established would be deemed to be an acceptance of the ICJ’s compulsory jurisdiction. The United States noted, however, that Article 36, paragraph 2 of the PCIJ Statute provided that a state could recognize the jurisdiction of the PCIJ by signing and ratifying the Protocol to the PCIJ Statute. Proper procedure required states to deposit “an instrument of ratification” with the League of Nations which, in turn, would confirm recognition of the PCIJ’s compulsory jurisdiction. Nicaragua signed the PCIJ Protocol in 1929, and the Nicaraguan Senate ratified it in 1935; however, the instrument of ratification was never deposited with the League of Nations. The United States therefore argued that Nicaragua had never made a binding acceptance of the PCIJ’s jurisdiction and, thus, its acceptance of jurisdiction could not have been “still in force” as required by paragraph 5 of Article 36 of the ICJ Statute.

Nicaragua did not contend that its 1929 declaration was in itself sufficient to establish a binding acceptance of the PCIJ’s compulsory jurisdiction. Rather, it argued that its ratification of the PCIJ Statute perfected its 1929 declaration, as evidenced by publications of the Court and UN Secretariat as well as past practice before the ICJ and the opinions of publicists.

The Court rejected the U.S. position and determined that Nicaragua had made a valid declaration recognizing the Court’s compulsory jurisdiction under Article 36, paragraph 2 of the PCIJ Statute. While conceding that Nicaragua had failed to deposit its ratification of the PCIJ Protocol with the League of Nations, the Court did not believe that the “absence of such formality” precluded application of Article 36, paragraph 5 of the ICJ Statute. The Court noted that Nicaragua had signed and ratified the United Nations Charter and thereby had accepted the Statute, which is part of the UN Charter, including the jurisdictional provisions of Article 36. Moreover, the Court found that Nicaragua had manifested its intent to recognize the Court’s compulsory jurisdiction by acquiescing over time to statements contained in the Court’s official *Yearbook* that Nicaragua had accepted the Court’s compulsory jurisdiction.

Five judges disagreed with this holding,³ noting that Nicaragua had never made, as required by the PCIJ Statute, a binding acceptance of the jurisdiction of the PCIJ; nor had Nicaragua cured this defect by unequivocal conduct showing acquiescence in the application of its 1929 declaration. Judges Oda and Jennings particularly objected to the Court’s reliance upon the *Yearbooks* and other United Nations publications as evidence of

³ A sixth judge voted with the majority on this issue but opined separately that, in his view, the Treaty of Friendship, Commerce and Navigation provided a firmer ground for jurisdiction. Separate Opinion of Judge Nagendra Singh, 1984 ICJ REP. 392, 444.

Nicaragua's acceptance of the Court's compulsory jurisdiction. Both judges pointed out that these publications contained caveats warning of Nicaragua's failure to ratify the PCIJ Protocol by depositing its instrument of ratification. Moreover, Judge Jennings noted that the *Yearbooks* contained disclaimers to the effect that the representations contained therein did not have any legal effect.

The Court also rejected the argument of the United States that its April 6, 1984 notification denied the Court jurisdiction to entertain Nicaragua's claims insofar as they were based on Article 36 of the ICJ Statute. The original declaration of the United States adhering to the "optional clause" and thereby accepting the compulsory jurisdiction of the Court stated that it was to "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration." The United States gave notice that it was withdrawing its acceptance of jurisdiction 3 days before Nicaragua filed its application with the Court. Such notice was deemed insufficient since, according to the Court, the United States had "assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice."⁴ The Court also dismissed the argument that, since Nicaragua could modify or terminate its jurisdictional declaration at any time, the United States, in accordance with the principle of reciprocity, should have the same right. Even if reciprocity were the controlling factor, the Court reasoned that Nicaragua could not in good faith have terminated its declaration without providing a reasonable period of notice. Without examining how long the requisite notice period might be, the Court concluded that 3 days would not be considered a "reasonable time."

Three judges disagreed with this holding. Noting the marked trend in recent years toward revocation of the Court's jurisdiction at will, regardless of the terms and conditions of a state's original declaration, Judge Oda concluded that the April 6 withdrawal was permissible. Judge Jennings concurred in this view and commented that the issue was not, as the Court maintained, governed by the law of treaties. Insisting that unilateral declarations under the optional clause must be viewed *sui generis*, Judge Jennings concluded that it would be impracticable and inequitable to hold the United States to its 6-month notice period while other states have reserved the right to terminate at will. Judge Schwebel also refused to hold the United States to a strict interpretation of its 6-month notice provision and observed that a more flexible approach to the reciprocity of declarations might maintain and encourage states to adhere to the Court's compulsory jurisdiction.

Apart from the question of jurisdiction under the ICJ Statute, the Court held that the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua provided a separate and independent basis for jurisdiction. Article XXIV, paragraph 2 of that Treaty

⁴ 1984 ICJ REP. at 419.

provides that any disputes arising thereunder and "not satisfactorily adjusted by diplomacy" shall be submitted to the Court "unless the Parties agree to settlement by some other pacific means." The United States argued that Nicaragua was barred from asserting this jurisdictional ground because it had neither alleged violations of the Treaty in its "application" to the Court nor attempted to resolve the dispute through diplomatic channels. The Court noted, however, that Nicaragua had stated in its "memorial"⁵ that the United States had violated several articles of the Treaty.⁶ Moreover, the Court found that Nicaragua should not be prohibited from invoking the jurisdictional provision of the Treaty simply because it had not expressly referred to violations of that Treaty in negotiations with the United States. According to the Court, "[t]he United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated."⁷

Judges Ruda and Schwebel disagreed. Judge Ruda asserted that Nicaragua should be debarred from invoking the Treaty because it had not followed the "simple and clear" procedural requirements set forth in the Treaty. Judge Schwebel agreed with this reasoning and, in addition, asserted that Nicaragua had failed to link the allegations of misuse of military force contained in its application with the commercial provisions of the 1956 Treaty.

The United States also argued that the Court lacked jurisdiction over various claims based upon four multilateral treaties⁸ since the United States, in its declaration pursuant to Article 36, paragraph 2, had reserved its acceptance of jurisdiction over disputes arising under a multilateral treaty unless "all parties to the treaty affected by the decision are also parties to the case before the Court." The United States argued that Nicaragua's claims were barred because three parties to the treaties—Honduras, Costa Rica and El Salvador—would be "affected by" a decision in the case. The Court rejected this argument, observing that the question of what states might be "affected by" a decision on the merits was more than a jurisdictional issue. The Court concluded that the objection did not possess "an exclusively preliminary character" and consequently did not preclude the Court from entertaining Nicaragua's application.⁹

⁵ In practice before the ICJ, an "application" is similar to a complaint in U.S. federal court practice and a "memorial" is another term for a legal brief.

⁶ 1984 ICJ REP. at 428 (citing Art. XIX (freedom of commerce and navigation), Art. XIV (freedom from restrictions on trade), Art. XVII (freedom from discrimination in obtaining marine insurance), Art. XX (freedom of transit) and Art. I (guarantee of equitable treatment to persons, property and other interests of nationals)).

⁷ 1984 ICJ REP. at 428-29.

⁸ In its application, Nicaragua relied upon the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. 1984 ICJ REP. at 422.

⁹ 1984 ICJ REP. at 425 (citing Art. 79, para. 7 of the Rules of the Court).

Judge Schwebel strongly disagreed with the Court's interpretation of the multilateral treaty reservation.¹⁰ The reservation, in his view, was meant to take effect at the jurisdictional phase of the proceedings. If, as Nicaragua asserted in its pleadings, Honduras, Costa Rica and El Salvador were supporting the United States in its military and paramilitary activities, then these countries could be equally liable for violations of international law. Relying upon the legislative history of the reservation, Judge Schwebel concluded that this was precisely the situation that the reservation was intended to avoid.

Although the members of the Court disagreed on the existence of jurisdiction, they unanimously concluded that, assuming that there was jurisdiction, the application filed by Nicaragua was admissible. In particular, the Court found that there was no requirement of prior exhaustion of regional negotiating processes and that the Contadora process did not bar examination by the Court of Nicaragua's application.

As this comment goes to press, the U.S. Department of State has announced that the United States will not further participate in the proceedings of the Court in this case. The consequence is that the Court will proceed to judgment on the basis of Nicaragua's submissions. Presumably, the result will be a default judgment in due course against the United States. Thereafter, the question of enforcement will arise in the Security Council under Article 94 of the Charter of the United Nations. It is assumed that the United States will use its veto in the Security Council to forestall enforcement action. As drastic as this action will seem to lifelong supporters of the idea of international adjudication, it must be acknowledged that the Court's line of reasoning in reaching the conclusion that Nicaragua has accepted the compulsory jurisdiction of the Court is so preposterous that the State Department has been given strong provocation for its unprecedented action. Nevertheless, this action is fraught with possibilities for undermining the authority of the Court and the progressive unraveling of the commitment to international adjudication. At the very least, it seems almost inevitable that the United States, and perhaps most other countries, will sharply curtail or withdraw altogether their acceptance of the compulsory jurisdiction of the Court. In view of these unfortunate probabilities, it is a matter for regret that the United States has decided as it has. Continued participation would at least have afforded time for a political settlement of the controversy.

¹⁰ Judge Jennings was willing to respect the United States's interpretation of the reservation and its identification of the states "affected by the decision." Because he felt that Nicaragua had raised fundamental and important issues of customary international law, however, he deferred to the majority on this issue, but urged that the multilateral treaty objection be dealt with in further proceedings of the Court. Separate Opinion of Judge Jennings, 1984 ICJ REP. at 555. Judge Ruda, analyzing the legislative history of the reservation, concluded that it was wholly inapplicable in these circumstances. Therefore, he agreed with the Court's rejection of the argument, but not on the ground that it lacked an exclusively preliminary character. Separate Opinion of Judge Ruda, *id.* at 458.

Sovereign immunity—Foreign Sovereign Immunities Act—execution of judgment—abuse of separate juridical status—commercial activity exception—tortious activity exception

LETELIER v. REPUBLIC OF CHILE. 748 F.2d 790.
U.S. Court of Appeals, 2d Cir., November 20, 1984.

Appellant, the Chilean National Airline (LAN), which was wholly owned by the Republic of Chile, sought review of a federal district court decision granting appellees' application to execute against LAN's assets in New York in order to satisfy a default judgment against the Republic of Chile. The U.S. Court of Appeals for the Second Circuit (per Cardamone, J.) reversed and *held*: that under the Foreign Sovereign Immunities Act, appellant enjoyed immunity from execution.

In 1976, Orlando Letelier, former Chilean Ambassador to the United States, his aide Michael Moffitt and Mr. Moffitt's wife were involved in a car bombing which killed Letelier and Mrs. Moffitt. In 1980, personal representatives of Letelier and Mrs. Moffitt obtained a default judgment in the U.S. District Court for the District of Columbia against the Republic of Chile for compensatory and punitive damages arising from the assassination.¹ Appellees filed the judgment in the U.S. District Court for the Southern District of New York for the purpose of executing on the property interest that the Republic of Chile held in appellant, the national airline of Chile, which was not a party to the District of Columbia litigation. The district court granted execution against appellant's assets pursuant to the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611 (1982)) (FSIA).² Specifically, the court relied on section 1610(a)(2) of the Act, which provides: "The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . if . . . the property is or was used for the commercial activity upon which the claim is based" In ordering execution, the district court found that the Republic of Chile had utilized the facilities, planes and personnel of LAN to carry out the assassination of Letelier. Relying on *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*,³ the court found that such use had constituted a gross abuse of the corporate form; in these circumstances, "equitable principles" required that LAN's separate corporate form be ignored so as to allow execution on the default judgment. The district court also found that LAN's unwitting participation in effecting the assassination constituted a "commercial activity upon which the claim is based."

The court of appeals reversed, finding that the district court had improperly ignored LAN's separate juridical status. Accordingly, the court

¹ Letelier v. Republic of Chile, 502 F.Supp. 259 (D.D.C. 1980).

² Letelier v. Republic of Chile, 567 F.Supp. 1490 (S.D.N.Y.) and 575 F.Supp. 1217 (S.D.N.Y. 1983).

³ 462 U.S. 611 (1983) (foreign state cannot avoid legal obligations or liabilities by engaging in abuses of corporate form).

determined that LAN's assets were not "[t]he property in the United States of a foreign state" within the meaning of section 1610(a)(2). The court of appeals disagreed with the lower court's interpretation and application of *Bancec* and found that joint participation in a tort was not an "abuse of corporate form" allowing the foreign state and the corporate entity to be treated as one and the same. According to the court, the Republic of Chile had not ignored LAN's separate corporate identity; nor was there evidence that Chile had established LAN as a separate entity to shield itself from liability for its tort, or that Chile had ignored ordinary corporate formalities. Moreover, unlike the circumstances in *Bancec*, appellees were seeking an affirmative recovery against a foreign state, not an equitable setoff by way of counterclaim.

The court of appeals also disagreed with the district court's finding that LAN's assets were "used for the commercial activity upon which the claim is based." The court observed that the District Court for the District of Columbia, in finding liability, had relied on section 1605(a)(5) of the FSIA—the "tortious activity" exception to sovereign immunity. Believing the "commercial activity" and "tortious activity" exceptions to subject matter jurisdiction to be mutually exclusive, the court observed: "If the district court in the District of Columbia lifted jurisdictional immunity based on its finding that the activities complained of were tortious, not commercial, it is inconsistent for this court to lift execution immunity based on a finding that the activities were commercial."⁴ The court also found that LAN's unwitting participation in the assassination was not a "commercial activity," since prior precedent suggested that a commercial activity is one that a private person may lawfully undertake.⁵ Applying this test, participation in a politically motivated assassination could not qualify as a commercial activity.

Finally, the legislative history of the FSIA and the nearly contemporaneous consideration of similar European legislation, which Congress took into account when drafting the FSIA, led the court to conclude that "under the circumstances at issue in this case Congress did in fact create a right without a remedy."⁶ The legislative history indicated that Congress only intended to eliminate *in part* the absolute immunity of foreign states to judgment execution. Similarly, the European Convention on State Immunity and the United Kingdom's State Immunity Act did not guarantee execution of a valid judgment against a foreign state.⁷

The court of appeals decision reflects a strict but textually correct view of execution immunity under 28 U.S.C. §1610(a)(2). It should be observed, however, that 28 U.S.C. §1610(a)(2) deals only with the execution against

⁴ 748 F.2d 790, 795.

⁵ See *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

⁶ 748 F.2d at 798.

⁷ See European Convention on State Immunity and Additional Protocol, 1972 ETS 74, reprinted in 11 ILM 470 (1972); the UK State Immunity Act 1978, ch. 33, reprinted in 17 ILM 1123 (1978).

property of foreign states, not the property of agencies or instrumentalities of such states. Thus, 28 U.S.C. §1610(b)(2) provides that any property located in the United States belonging to an agency or instrumentality of a foreign state that is engaged in a commercial activity in the United States shall not be immune from execution upon a judgment if "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, *regardless of whether the property is or was used for the activity upon which the claim is based*" (emphasis added).⁸

Expropriation—due process—political question doctrine—standing—equitable discretion of U.S. courts—act of state doctrine

RAMIREZ v. WEINBERGER. 745 F.2d 1500.

U.S. Court of Appeals, D.C. Cir., October 5, 1984.

Suit for declaratory and injunctive relief was brought by a U.S. citizen and six corporations wholly owned by him against the Secretary of Defense and other U.S. officials claiming that the defendants had without either constitutional or statutory authority seized their privately owned ranch in Honduras for the purpose of operating thereon a military camp for training Salvadoran soldiers. The U.S. District Court for the District of Columbia without discovery or finding of fact dismissed the complaint on the ground that the plaintiffs' allegations presented a nonjusticiable political question.¹ On appeal, a divided three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court on other grounds, holding that plaintiffs had failed to present a claim upon which relief could be granted.² Subsequently, the court of appeals vacated the panel's decision. Following a rehearing en banc, the court by a vote of six to four reversed the district court and *held* (per Wilkey, J.): that the case presented a justiciable claim upon which relief could be granted and that the U.S. plaintiffs had standing to bring suit.

Plaintiffs alleged that the U.S. Department of Defense had occupied their land since March of 1983, at which time the U.S. Government, in conjunction with the Honduran Government, established on their ranch a Regional Military Training Center to train soldiers for the Salvadoran Army. Plaintiffs claimed that defendants' occupation and destruction of their property was without sanction by U.S. or Honduran law and was therefore unconstitutional and had deprived the plaintiffs of the use and enjoyment of their property without due process of law. Plaintiffs sought injunctive, declaratory and such other relief as the court deemed appropriate against defendants' continued occupation of their property.

At the outset, the court of appeals stated that the complaint could not be dismissed for failure to state a claim for relief unless plaintiffs could prove no set of facts in support of their claim. According to the court,

⁸ It should be noted that a request for rehearing was denied on Jan. 4, 1985.

¹ 568 F.Supp. 1236 (D.D.C. 1983).

² 724 F.2d 143 (D.C. Cir. 1983), *summarized in* 78 AJIL 446 (1984).

"[i]t is settled law that the Executive's power to take the private property of United States citizens must stem from an act of Congress or from the Constitution itself."³ Plaintiffs had alleged that no statute or constitutional provision authorized the U.S. Government to take their property, and that their property had been taken without due process. Assuming the allegations to be true for purposes of ruling on the defendants' motion to dismiss, the court ruled that the complaint stated a valid constitutional claim.

The court then addressed the question of justiciability, relying upon three criteria summarized by Justice Powell in *Goldwater v. Carter*⁴ for identifying nonjusticiable political questions:

- (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
- (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?
- (iii) Do prudential considerations counsel against judicial intervention?⁵

Applying these criteria to plaintiffs' allegations, the court concluded that the case presented a justiciable claim. According to the court, plaintiffs' claims were not exclusively committed to the political branches. On the contrary, plaintiffs sought adjudication of a narrow issue—whether the U.S. Government may conduct military exercises on plaintiffs' private property when the land has not been lawfully expropriated. Resolution of this question would involve interpretation of the Constitution and federal statutes, a task that is committed to the federal judiciary. The court of appeals also disagreed with the district court's conclusion that litigation would require examination of nondiscoverable, sensitive communications between executive branch officials and officials of a foreign power. "It is premature to conclude that essential evidence is undiscoverable merely on the basis of the complaint and related declarations in this case."⁶ Finally, relying on *Baker v. Carr*,⁷ the court found no prudential considerations requiring dismissal of the complaint, noting that "[t]he prudential, separation-of-powers concerns presented by the instant case are certainly not greater than those underlying the wartime seizure of an entire industry by the Executive in *Youngstown* [*Sheet & Tube Co. v. Sawyer*]."⁸

The court of appeals examined the question of standing, which the government defendants had raised for the first time before the en banc panel. The United States argued that since Ramirez de Arellano, a U.S. citizen, and his two wholly owned U.S. corporations controlled the land in Honduras through wholly owned Honduran corporations, the three

³ 745 F.2d 1500, 1510 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hooe v. United States*, 218 U.S. 322 (1910); *The Paquete Habana*, 175 U.S. 677 (1900)).

⁴ 444 U.S. 996 (1979).

⁵ *Id.* at 998.

⁶ 745 F.2d at 1513.

⁷ 369 U.S. 186 (1962).

⁸ 745 F.2d at 1514 (relying upon 343 U.S. 579 (1952)).

U.S. plaintiffs did not have a constitutionally protected property interest. The court of appeals viewed this argument as "a most extreme form of fanciful thinking" and opined that such a position, if adopted, "would obliterate the constitutional property rights of many United States citizens abroad and would make a mockery of decades of United States policy on transnational investments."⁹

The court of appeals also refused to uphold the dismissal of plaintiffs' complaint on the grounds that relief was not available in the district court. According to the court, appropriate remedies must be determined in the first instance by the district court based on particular findings of fact as well as the nature of any proved unlawful conduct. Therefore, whether relief was possible must await further proceedings. The court noted that although the Tucker Act would appear to vest the Claims Court with jurisdiction over a claim for monetary relief, it was unclear whether claims based upon *unauthorized* acts of government officials were relegated exclusively to the Claims Court. Moreover, absent adequate monetary relief, an injunctive remedy would not be barred by the doctrine of sovereign immunity. Likewise, declaratory relief can be granted by the district court for unlawful government activities.

Finally, the court of appeals rejected defendants' argument that the complaint should be dismissed on the basis of the act of state doctrine—an argument not made in the court below. The court reasoned that a successful act of state defense must demonstrate (1) that an act of state has in fact occurred, and (2) that no exception to the doctrine is applicable. The court concluded that on the present state of the record it would be premature to say that the defendants could show that a Honduran act of state had in fact occurred or that no exception to the doctrine was applicable.¹⁰

The heart of Judge Wilkey's position is eloquently stated in one of his concluding paragraphs:

We will not retreat to the spurious ground urged by the defendants for this precipitous dismissal of the plaintiffs' validly stated constitutional claims. The Judiciary is fully empowered to vindicate individual rights overridden by specific, unconstitutional military actions. Charges that United States officials are unconstitutionally housing over 1,000 soldiers on a United States citizen's private ranch and running military forays throughout the pastures cannot conscionably be dismissed by this court at the stage of bare complaint and supporting

⁹ 745 F.2d at 1516. The court did not reach the question whether the Honduran corporations also have a constitutional right to judicial relief in U.S. courts for the alleged violations.

¹⁰ In addition, the court stated that certain legal obstacles may exist to an act of state defense, including the First Hickenlooper Amendment which sets limits on U.S. foreign assistance to countries that have expropriated the property of U.S. citizens without paying compensation. According to the court, if the Honduran Government had indeed acted and taken plaintiffs' property, then the President could be in violation of this amendment requiring the United States to suspend foreign assistance to Honduras.

declarations. We emphatically reject the proposition that the federal courts are closed to these United States plaintiffs from the start.¹¹

The case is obviously one of great importance in the eyes of the Department of Defense. On November 19, 1984, application was made to the court of appeals to reconsider its en banc decision. This request was denied. Chief Justice Burger at the request of the Solicitor General issued an order staying the lower court's ruling, thereby allowing the U.S. Government time to seek, through a petition for certiorari, review and reversal by the United States Supreme Court.

Foreign Corrupt Practices Act—criminal prosecution—employer violation as prerequisite for prosecution of employee

UNITED STATES v. McLEAN. 738 F.2d 655.

U.S. Court of Appeals, 5th Cir., August 10, 1984.

Appellant, the United States, sought review of a district court decision dismissing charges against appellee, George S. McLean, under the Foreign Corrupt Practices Act (FCPA).¹ The U.S. Court of Appeals for the Fifth Circuit (per Davis, J.) affirmed the district court's decision and *held*: that the FCPA prohibits prosecution of an employee for a substantive offense under the Act if his employer has not and cannot be convicted of similarly violating the FCPA.

In October 1982, the United States issued an indictment charging Crawford Enterprises, Inc., a broker for International Harvester Company, and nine individuals, including appellee, an employee of International Harvester, with (1) conspiracy to use interstate or foreign instrumentalities to bribe officials of Petroleos Mexicanos (Pemex), the national petroleum company of Mexico, (2) 47 substantive violations of the FCPA, and (3) obstruction of justice. International Harvester was not charged with this indictment, but was charged in a separate bill of information with one count of conspiring to violate the FCPA. In November 1982, International Harvester entered a guilty plea to the conspiracy charge. As part of the plea bargain, the Government agreed not to bring any further charges against International Harvester arising out of its sales to Crawford Enterprises and Pemex.

In the subsequent prosecution of the individual defendants, the district court held that the substantive charges against appellee should be dismissed on the ground that the FCPA allows criminal prosecution of an employee only if the employer was also convicted of a similar substantive offense. The district court relied on 15 U.S.C. §78ff, which provides in relevant part:

(c)(3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the

¹¹ 745 F.2d at 1543.

¹ Pub. L. No. 95-213, tit. I, 91 Stat. 1494 (1977) (amending 15 U.S.C. §§78g(b), 78dd, 78ff(a) (1976)).

jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years or both.

The district court concluded that since International Harvester's guilty plea to conspiracy was not a substantive violation, appellee could not be prosecuted for substantive violations of the FCPA.

On appeal, the United States first contended that the "found to have violated" language of 15 U.S.C. §78ff did not require that the employer actually be convicted of an FCPA violation; rather, this requirement could be satisfied at the employee's trial by evidence demonstrating that the employer had in fact violated the Act. The court of appeals examined the relevant legislative history of 15 U.S.C. §78ff and found that a major objective of that provision was to discourage an employer from disavowing knowledge of its employee's actions and making the employee a "scape-goat." Accordingly, the court concluded:

To permit the government to prosecute McLean and attempt to make a case against unindicted Harvester at McLean's trial places McLean in the undesirable position of defending not only himself, but also his employer—without the benefit of the employer's resources and knowledge. Harvester would have no incentive to assist McLean in his defense; in fact Harvester would have every incentive to shift as much culpability as possible to McLean.²

The Government also argued that appellee could be prosecuted not as an employee of International Harvester, but in his individual capacity for aiding and abetting Crawford Enterprises. The Government, however, did not contend that appellee was a "renegade employee." To the contrary, it had conceded that appellee had acted for the benefit and on behalf of his employer, International Harvester. The court concluded that since appellee had acted as an employee, he must be prosecuted in that capacity. Otherwise, the Government would be permitted to avoid the strictures of 15 U.S.C. §78ff.

Finally, the Government contended that International Harvester's conspiracy conviction satisfied the "found to have violated" requirement of 15 U.S.C. §78ff. The court, however, noted that under traditional notions of criminal law, a conspiracy to commit a crime is separate and distinct from the commission of a substantive offense. Therefore, International Harvester's conviction for conspiracy did not satisfy the Act's requirement of a predicate violation by the employer.

This case appears to be the first instance in which a federal court of appeals has determined that the FCPA does not permit the prosecution of an employee if his employer has not and cannot be convicted of a similar substantive violation. On one hand, this holding may be viewed as

² 738 F.2d 655, 659.

affording necessary protection against selective prosecution by federal authorities. On the other hand, it may induce a less flexible prosecutorial approach by federal authorities who might otherwise be sympathetic to plea arrangements with corporations charged with violating the FCPA.

Act of state doctrine—limited applicability of doctrine where contracting parties allocate risks of state action

GARCIA v. CHASE MANHATTAN BANK, N.A. 735 F.2d 645.
U.S. Court of Appeals, 2d Cir., March 28, 1984, as amended June 20, 1984.

Appellant, Chase Manhattan Bank, sought review of a district court judgment awarding appellee, a former Cuban citizen, an amount due on two certificates of deposit issued by a branch of Chase located in Cuba. The U.S. Court of Appeals for the Second Circuit (per Meskill, J.) affirmed and *held*: that the Cuban Government's confiscation of appellee's accounts in Cuba did not void Chase's obligation to ensure the safety of appellee's funds, nor did the act of state doctrine require judicial abstention in this case. Judge Kearse dissented.

In 1958, Chase's branch bank in Vedado, Cuba issued to appellee and her husband two certificates of deposit, which Chase's officials characterized at the time as "private contracts" between Chase and appellee. Chase assured appellee that its New York office would guarantee repayment of the certificates in U.S. dollars upon presentment at any of Chase's worldwide branches. In February 1959, the revolutionary Government of Cuba enacted Law No. 78, which empowered the Government to freeze assets and recover property deemed to have been "removed from the National Wealth." Soon thereafter, upon order of the Cuban Government, Chase closed appellee's account and remitted its value to the Cuban Government. Upon Chase's subsequent refusal to honor a demand for payment on the certificates, appellee brought suit; and the U.S. District Court for the Southern District of New York entered judgment in favor of appellee.

On appeal, Chase argued, *inter alia*, that its obligation to pay appellee was extinguished by the Cuban Government's appropriation of Chase's funds in a sum equal to the amount of its debt to appellee. Chase also argued that the act of state doctrine precluded the court from questioning the validity of the Cuban Government's action and adjudicating the claim.

With respect to the first contention, the court observed that the moneys paid to the Cuban Government did not come from funds specifically earmarked to appellee's "account," but from Chase's general funds in the branch bank. The court likened the Cuban appropriation to a "bank robbery"—Cuba entered the branch "armed with Law No. 78" and Chase turned over the funds without requiring the surrender of the certificates and "without a fight." The court concluded that "[w]here, as here, the debtor-creditor relationship was created primarily to ensure the

safety of the creditors' funds, a debtor's payment to a third party of a sum equal to that owed the creditors does not extinguish the original debt."¹

Turning to the act of state question, the court acknowledged that if the situs of Chase's debt to appellee was in Cuba, the Cuban Government could validly seize it. But even if what occurred was the seizure of a debt located in Cuba, "the facts in the instant case" required a result in favor of appellee. The court emphasized that appellee selected Chase because of its international reputation; that Chase had made assurances to appellee that her funds would be protected; and that "[t]he purpose of the [deposit] agreement . . . was to ensure that, no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors upon presentation of their CDs."² In addition, the court observed that its decision would have no international repercussions, and therefore did not implicate the act of state doctrine, because the court was not challenging the validity of the Cuban Government's actions. Rather, the court was "simply resolving a private dispute between an American bank and one of its depositors."³

The question of a U.S. bank's liability for deposits located in its foreign branch office has been the subject of considerable judicial and scholarly writing.⁴ For example, in *Vishipco Line v. Chase Manhattan Bank, N.A.*,⁵ the Second Circuit refused to apply the act of state doctrine and held Chase liable to a foreign depositor for accounts confiscated by the Communist regime in Vietnam. The court reasoned that U.S. banks, by operating through branch offices in foreign territories, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank. In the instant litigation, the court followed a similar rationale, finding that Chase's promise to pay its depositor was a legally enforceable obligation that could not be discharged by the intervening actions of the Cuban Government.

It should be noted that in *Perez v. Chase Manhattan Bank, N.A.*,⁶ a case decided two days after *Garcia*, the New York Court of Appeals heard facts almost identical to the *Garcia* claim but concluded that the act of state doctrine precluded an award for the plaintiff. Although the plaintiff in *Perez* had received similar assurances from Chase that the certificates could be redeemed at any Chase office worldwide, the New York court found

¹ 735 F.2d 645, 649.

² *Id.* at 650 (relying upon *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), summarized in 76 AJIL 385 (1982), cert. denied, 459 U.S. 976 (1982)).

³ 735 F.2d at 651.

⁴ See, e.g., *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), summarized in 76 AJIL 385 (1982), cert. denied, 459 U.S. 976 (1982); *United States v. First Nat'l City Bank*, 321 F.2d 14 (2d Cir. 1963), rev'd on other grounds, 379 U.S. 378 (1965); *Sokoloff v. National City Bank of New York*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), aff'd, 250 N.Y. 69 (1928); Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y INT'L BUS. 903 (1979).

⁵ 660 F.2d 854 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982).

⁶ 463 N.E.2d 5 (N.Y. 1984).

that the situs of the debt was Cuba and that the Cuban Government's confiscation of the debt was an act of state beyond the court's review. Since the Cuban Government's confiscatory act was beyond review, the bank's debt to its depositor was extinguished for all purposes; and therefore Chase's obligation to pay was fully discharged.⁷ Judge Wachtler, dissenting in *Perez*, apparently adopted the reasoning of the majority in *Garcia*, observing that

[i]f the Act of State doctrine requires this court to abstain from considering the legality or illegality of the foreign seizure, . . . it should not preclude the court from resolving this private dispute by consideration of other factors in much the same manner as we would if it had been precipitated by an act of nature.³

Foreign Sovereign Immunities Act—retroactive application—liability of People's Republic of China for defaulted railway bonds

JACKSON v. PEOPLE'S REPUBLIC OF CHINA. 596 F.Supp. 386.
U.S. District Court, N.D. Ala., E.D., October 26, 1984.

Plaintiff instituted this class action suit in federal district court against the People's Republic of China (PRC), seeking payment on certain bonds, now in default, that had been issued by the Imperial Chinese Government in 1911 to finance the construction of a railway. After the PRC failed to respond, the district court entered a default judgment and awarded damages.¹ In August of 1983, almost a year after the entry of the default judgment, the PRC at the urging of the U.S. Department of State made a special appearance and obtained an order, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, setting aside the judgment. The PRC then moved to dismiss the complaint. The U.S. District Court for the Northern District of Alabama (per Clemon, J.), following a line of reasoning formulated by the Department of State and presented in a statement of interest filed by the Department of Justice, dismissed the complaint for want of subject matter jurisdiction and *held*: that the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611 (1982)) (FSIA) could not be applied retroactively to the activities upon which plaintiff's cause of action was founded.²

The principal issue for the court was whether the PRC was immune from suit in U.S. courts for the defaulted railway bonds issued by a predecessor government. Because the sole basis for subject matter jurisdiction was the FSIA, the key question for the court was whether the FSIA should be applied retroactively to govern the events underlying this

⁷ The court found that the Hickenlooper Amendment exception to the act of state doctrine did not apply since "confiscations by a foreign State of the property of its own nationals within its borders . . . [is] 'not contrary to international law.'" *Id.* at 10 (citation omitted).

⁸ *Id.* at 11 (Wachtler, J., dissenting).

¹ See *Jackson v. People's Republic of China*, 550 F.Supp. 869 (N.D. Ala., E.D. 1982), summarized in 77 AJIL 146 (1983).

² A notice of appeal was filed on Nov. 15, 1984.

litigation. The court noted at the outset that under U.S. law the presumption is that statutes are to be applied prospectively, in the absence of the clear expression of congressional intent to the contrary. The court also took note of the rule that the rights of a party to a contract ordinarily are determined in light of the law existing at the time that the contract was made.³

Having established these presumptions, the court recalled that historically foreign governments enjoyed absolute immunity from suit in U.S. courts, and that this was a tenet of American law in 1911 when the Chinese Government issued the railway bonds. Although this doctrine came under review in the 1930s and 1940s, it was not replaced by any formal statement of policy until 1952, when the U.S. Department of State issued the Tate letter adopting the restrictive view of sovereign immunity. Thus, the court found, both at the time the bonds were sold and at the time they matured in 1951, the Chinese Government had an expectation of absolute immunity in its contractual relationship with U.S. parties. Likewise, according to the court, the predecessor bondholders had no expectation of a right to bring an action against the PRC on the basis of the bonds.

As for the intent of Congress regarding the application of the FSIA, the court observed that neither the statutory language nor its legislative history explicitly provided for retroactive application. To the contrary, the court concluded that Congress intended the statute to apply prospectively, relying on the statutory language indicating that foreign state claims of immunity would "henceforth" be decided pursuant to the FSIA's provisions.⁴ Furthermore, the Act incorporated a specific provision delaying its application for 90 days, so as to give adequate notice to foreign governments of the change in U.S. policy.⁵

Although the court's decision was relatively straightforward and could be viewed as consistent with other judicial decisions,⁶ the court may have placed more reliance on the "henceforth" language of the FSIA than the draftsmen intended. Some courts have interpreted this language to authorize application of the FSIA's provisions immediately upon the effective date of the Act, thereby allowing application to actions pending on that date or instituted thereafter regardless of the dates of the underlying events.⁷ In the present case, suit was filed after the effective date of the

³ To support these points, the court quoted from established Supreme Court precedents, *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913), and *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

⁴ 28 U.S.C. §1602 (1982).

⁵ Pub. L. No. 94-583, sec. 8, 90 Stat. 2891, 2898 (1976).

⁶ See *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786 (2d Cir. 1980), *cert. denied sub nom. Corporacion Venezolana de Fomento v. Merban Corp.*, 449 U.S. 1080 (1981); *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979); *Ohntrup v. Firearms Center Inc.*, 516 F.Supp. 1281 (E.D. Pa. 1981).

⁷ See, e.g., *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849 (S.D.N.Y. 1978); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980). In the latter case, the court found that the "henceforth" language applied only to

FSIA. In *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, the U.S. Court of Appeals for the Second Circuit acknowledged that certain courts had applied both the substantive immunity provisions and the jurisdictional section of the FSIA retroactively to cases filed before the Act's effective date.⁸ In *Vintero Sales*, however, the court refused to apply the jurisdictional section of the FSIA retroactively, relying on its interpretation of congressional intent and the principle that jurisdiction should be determined at the time of commencement of suit.

Since the enactment of the FSIA, the State Department has forsworn its prior practice of filing suggestions of immunity—suggestions that the courts ultimately came to regard as controlling.⁹ However, the Department made clear at the time of enactment that it would from time to time file briefs amicus. The present case is the first in which the Department has in fact submitted its views and its intervention has been decisive. There can be no objection to this practice so long as the Department confines itself to urging upon the courts purely legal—as distinguished from diplomatic—considerations.

Act of state doctrine—counterclaims—"Bernstein letter"

BANCO NACIONAL DE CUBA v. CHEMICAL BANK NEW YORK TRUST CO.
594 F.Supp. 1553.

U.S. District Court, S.D.N.Y., October 16, 1984.

In three separate actions being litigated together, plaintiff, Banco Nacional de Cuba, sought to recover funds deposited with defendants, three New York banks. Defendants counterclaimed, asserting a right to set off losses incurred when the Cuban Government expropriated Cuban Electric, a company owing substantial debts in Cuba to defendants.¹ Plaintiff moved for summary judgment, contending that because the executive branch had not issued a "Bernstein letter" in these cases—i.e., an express indication that the policy of the executive branch was to encourage the court to examine the validity of the foreign state's actions—the act of state doctrine applied to the cases and prohibited judicial consideration of defendants' counterclaims. The U.S. District Court for the Southern District of New York (per Brieant, J.) denied plaintiff's motions and *held*: that pronouncements by the executive branch relating to other, similar cases satisfied the "Bernstein letter" exception to the act of state doctrine with respect to the present cases, and that therefore defendants' counterclaims would not be dismissed.

the substantive immunity provisions of the Act, and not to the jurisdictional section, as to which "[t]he Preamble [of the FSIA] does not purport to say anything about the retroactive application" *Id.* (footnote omitted).

⁸ *Vintero Sales*, 629 F.2d at 790.

⁹ See, e.g., *Mexico v. Hoffman*, 324 U.S. 30 (1945).

¹ In an earlier decision in these cases, the Court of Appeals for the Second Circuit reversed the lower court's dismissal of plaintiff's claims and remanded the cases for consideration of defendants' counterclaims. *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981).

The court first rejected plaintiff's contention that the act of state doctrine must be invoked in every case unless the record in that case contains a "Bernstein letter." In this respect, the court noted that in the very case in which the "Bernstein letter" exception originated,² the court rejected the act of state defense in light of a State Department press release of "general interest," as opposed to a letter that addressed itself to that particular case. Similarly, in *First National City Bank v. Banco Nacional de Cuba*,³ Justice Rehnquist, writing on behalf of himself, Chief Justice Burger and Justice White, took notice of the State Department's position even though a "Bernstein letter" had not been submitted to the courts below; and in *Banco Nacional de Cuba v. Chase Manhattan Bank*,⁴ the U.S. Court of Appeals for the Second Circuit relied in part on State Department communications that had been written years earlier to the Supreme Court in connection with *First National City Bank*. From this review of the history of the "Bernstein letter," the court concluded that it may, "as a matter of discretion, accept the views of the State Department as communicated in any public utterance, whether it be in this case, other litigation, or as a public announcement."⁵

The court recognized three possible factual distinctions between the cases at bar and the previous cases. First, the court considered the argument that Banco Nacional's claims arose as a result of the Cuban expropriations and not out of the ordinary course of its prerevolution banking business. The court rejected this distinction because Banco Nacional was the successor in interest to various private banks that had deposited funds with defendants in the ordinary course of business. Accordingly, Banco Nacional's claims were similar to the claim asserted by the Cuban plaintiffs in *First National City Bank* and *Chase*.

Second, the court acknowledged that, unlike the previous Cuban expropriation cases involving a "Bernstein letter," Banco Nacional's claims arose *after* the expropriations and therefore did not "arise out of a relationship existing when the defendants' counterclaims accrued."⁶ The court held, however, that this distinction was immaterial, since under the "equitable principles" set forth in prior decisions, the Cuban Government is "not permitted . . . to use our courts to recover moneys it obtained through the nationalization of the private banks and simultaneously avoid counterclaims for set-off arising from other related actions taken by the Cuban government as part of the same nationalization policy."⁷

² *Bernstein v. N.V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

³ 406 U.S. 759 (1972). In *First National City Bank*, the Legal Adviser of the Department of State had issued a letter which stated in part that "[t]he Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." *Id.* at 764.

⁴ 658 F.2d 875 (2d Cir. 1981).

⁵ 594 F.Supp. 1553, 1563-64.

⁶ *Id.* at 1564.

⁷ *Id.* at 1565 (relying upon *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955)).

Finally, the court acknowledged that unlike prior Cuban expropriation cases, defendants' counterclaims arose from an expropriation of a third party's property. Nevertheless, the court reasoned, the counterclaims were based on the taking of a chose in action, namely an outstanding debt incurred by the expropriated company. Moreover, when the assets of Cuban Electric were expropriated, so were its liabilities. "Consequently, just as was the situation in *Chase*, the defendants seek recovery for the expropriation by Cuba of property in which the defendants have an interest."⁸

The court concluded, as a matter of law, "that these cases, having arisen out of the Cuban expropriations, are sufficiently similar [to *First National City Bank* and *Chase*] to permit this Court to recognize [prior] public statements by the State Department which express the Executive Branch's approval of judicial intervention in cases such as those at issue here."⁹

This decision reflects yet another instance of judicial reluctance to apply the act of state doctrine to bar counterclaims arising from an expropriation that violates international law. The court's reading of *First National City Bank* and *Chase* suggests that in future litigations it could be argued that the existence of a "Bernstein letter" should be presumed, based upon prior State Department pronouncements. The burden would then be on the party asserting an act of state defense to rebut this presumption by introducing specific evidence of executive branch disapproval of adjudication of the counterclaims.

Export Administration Act—export licensing—presidential authority to preclude judicial review under the International Emergency Economic Powers Act

NUCLEAR PACIFIC, INC. v. UNITED STATES DEPARTMENT OF COMMERCE.
No. C84-49R.
U.S. District Court, W.D. Wash., June 8, 1984.

Plaintiff, Nuclear Pacific, Inc., applied for a license to export nuclear radiation shielding windows to India. The U.S. Department of Commerce denied the application on national security grounds, and plaintiff thereupon filed suit in the U.S. District Court for the Western District of Washington, challenging the denial. Defendants moved to dismiss arguing, inter alia, that judicial review of the licensing decision was precluded by statute.¹ The district court (per Rothstein, J.) denied defendants' motion and *held*:

⁸ 594 F.Supp. at 1565.

⁹ *Id.* at 1564.

¹ Defendants also argued that the case presented a nonjusticiable political question involving national security considerations and that plaintiff had failed to exhaust administrative remedies. The court, however, characterized plaintiff's claim as a justiciable challenge to the federal regulations implementing export-licensing decisions. Moreover, since exhaustion of the administrative appeal process was not mandated by an existing statute, application of the exhaustion doctrine was within the sound discretion of the court. The court found that, on balance, plaintiff's need for judicial resolution of the dispute outweighed the interests of the Commerce Department in continued administrative proceedings.

that the court's jurisdiction should not be determined under the Export Administration Act, since the Act had expired prior to the date of the court's decision; and that neither the International Emergency Economic Powers Act nor the President's inherent constitutional authority could preclude judicial review of the Commerce Department's licensing determination.²

The Export Administration Act of 1979 (50 U.S.C. App. §§2401 *et seq.*) (EAA) grants the Commerce Department authority to control U.S. exports through a licensing procedure. Section 13(a) of the EAA exempts the functions exercised under the EAA from the judicial review procedures of the Administrative Procedure Act (5 U.S.C. §§551 *et seq.*). On March 30, 1984, however, after the Commerce Department issued its decision denying plaintiff's export license application, the EAA expired.³ The President, acting pursuant to the Constitution and the International Emergency Economic Powers Act (50 U.S.C. §§1701-1706) (IEEPA), thereupon issued Executive Order No. 12470 (49 Fed. Reg. 13,099 (1984)), proclaiming that the EAA's provisions, as well as the Commerce Department's export-licensing regulations, "shall, to the extent permitted by law, be incorporated in this Order and shall continue in full force and effect."

Plaintiff claimed that the Commerce Department's denial of its license application was arbitrary and capricious and violative of its due process rights under the U.S. Constitution. Defendants argued that the action should be dismissed pursuant to section 13(a) of the EAA, which, defendants noted, was in force at the time of the Commerce Department's licensing decision. Defendants argued that the lapse of the EAA was of no consequence because Executive Order No. 12470 maintained the EAA's regulatory regime.

In denying defendants' motion, the court first noted that as a general rule a court must apply the law in effect at the time it renders a decision unless doing so would result in a manifest injustice or there is a congressional directive to the contrary. Applying this principle, the court examined the terms of the EAA and its legislative history and determined that Congress did not intend the EAA to be applied beyond its termination date. Accordingly, the court held that its jurisdiction must be determined under Executive Order No. 12470.

The court observed that Article III, section 2, clause 2 of the Constitution grants Congress exclusive authority to define the jurisdiction of the lower federal courts. Presidential power limiting the jurisdiction of such courts must "be through a delegation of Congress' power."⁴ The court acknowledged that Congress, through the IEEPA, granted the President broad powers to deal with national emergencies. The court also observed,

² On Oct. 23, 1984, the Government filed a notice of appeal.

³ The EAA expired initially on Sept. 30, 1983, but was extended by Congress through joint resolutions until Mar. 30, 1984.

⁴ Slip op. at 7.

however, that the IEEPA does not expressly or implicitly grant the President authority to limit the jurisdiction of federal courts.⁵ Although the IEEPA's legislative history indicates that the statute could be used to continue export control regulations if the EAA expired, the power to preclude judicial review of licensing decisions is not specifically enumerated in these regulations. Likewise, the IEEPA's legislative history is silent regarding the question of judicial review of export licensing decisions. Thus, the court found that the "clear and convincing" legislative intent necessary to defeat a presumption of judicial review⁶ was absent from the terms and legislative history of the IEEPA. As such, the court concluded that it was free to exercise its jurisdiction to hear plaintiff's claim and to review the Commerce Department's licensing decision. To hold otherwise, the court observed, would raise serious constitutional questions.

Nuclear Pacific is the first instance in which a court has limited the President's IEEPA authority to enforce the expired provisions of the EAA. Although the decision could be read to place in jeopardy other EAA provisions (for example, those pertaining to the Arab boycott of Israel), such a reading may be overly broad. The court was careful to frame the question narrowly as one involving presidential power to preclude judicial review of export-licensing decisions. Moreover, the court acknowledged that the case presented "thorny constitutional issues" associated with questions of procedural due process and separation of powers. A challenge to the Commerce Department's enforcement of the EAA's antiboycott regulations may not pose identical constitutional issues and might also involve less difficult questions of statutory interpretation. Nevertheless, *Nuclear Pacific* marks a limit to the President's IEEPA powers and could well lead to similar challenges in the future.

* * * *

NOTE: Although no case notes of decisions of the Iran-United States Claims Tribunal are included in this issue of the *Journal*, such notes will be included in the following issues.

⁵ In this respect, the court relied on various cases that considered the legality of a different executive order—No. 12294—which suspended claims pending in U.S. courts against the Iranian Government. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Electronic Data Systems Corp. Iran v. Social Sec. Org. of Iran*, 508 F.Supp. 1350 (N.D. Tex.), *aff'd in part and vacated in part*, 651 F.2d 1007 (5th Cir. 1981) (executive orders lacking congressional approval or authority cannot interfere with the exercise of jurisdiction by federal courts).

⁶ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

Law-Making in the Global Community. Edited by Nicholas Greenwood Onuf.

Published under the auspices of the Center of International Studies, Princeton University. Durham: Carolina Academic Press, 1982. Pp. xv, 214. \$29.95.

As one would expect of Nicholas G. Onuf and his distinguished cocontributors, this is a stimulating volume. It delves most interestingly into the sources and the nature of international law. With an inspiring foreword by Richard Falk, it consists of the five essays retained for publication at the conclusion of a conference held at the Center of International Studies, Princeton University, which was responsible, between 1969 and 1972, for the four well-known volumes on *The Future of the International Legal Order*, edited by Cyril Black and Falk.

Onuf's *Global Law-Making and Legal Thought* (pp. 1-81) clearly surveys the historical development of legal scholarship about international law and its sources. After presenting a condensed analysis of the positivist, naturalist and sociological theories, he goes on to elucidate and defend, under the acknowledged guidance of Max Weber, McDougal, Falk and others, what he calls the "unconventional" position on the "concept of an international legal order" that he took in this *Journal* in 1979.¹ It is the position that international law is "legal," first, because its guardians are lawyers, and what lawyers "call law is law" for the social order within which they operate; second, if I understand correctly, because it is at least on the way to being "constituted" (thanks to the presence of the United Nations) in a sense similar to the sense in which states are "constituted" by their constitutions. As indicated by the author, the first element is close to Weber's definition: "An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose"; a condition that, in any case, we are unable to find, alas, in the law of nations.

After discussing briefly the "relationship between international law and the naturalist and positivist theories" and stating that international law "today reflects, and necessarily absorbs the naturalist position," D'Amato's short essay (*What "Counts" as Law?*, pp. 83-107) aims at specifying "how the line is to be drawn" between "law and non-law" in the relations among nations. Following an analysis of the historical development of the notion of "validation" of international rules, the author deals with consen-

¹ 73 AJIL 266 (1979).

sus, custom, treaties, judicial decisions, general principles of law and unilateral declarations as possible "sources" of "validators" of international rules. He concludes by recommending "careful scholarship" in the area of "objective validation" of international law.

Under the title *Global Bargaining: The Legal and Diplomatic Framework* (pp. 109-30), Gidon Gottlieb studies the impact on lawmaking of the "emergence of a new world order shaped more by bargains, compromises, and necessity than by grand architectural designs," which is under way because "[d]eep structural changes are taking place [following] the decline of the big power blocs and the rise of states organized in global political parties." The core of this essay consists of two parts. One ("Diplomatic Modes and Procedures of Decision in International Arenas") illustrates what the author considers to be the crisis of the majority principle and of the principles of equality and representation and the practice of the "principle of parity" between groups of states rather than between individual states. The second part of the essay—whose author is known for the "acceptance model," which he contrasts with the "imperative" conceptions of international law²—deals more specifically with the increased variety of instruments in which "[g]lobal and regional bargains are struck" in our time (Final Act of the Conference on Security and Co-operation in Europe and other instances). In particular, an attempt is made to classify different types of assurances, undertakings, commitments and political intentions of the United States.

In *International Law-Making: A View From Technology* (pp. 131-71), Zdenek J. Slouka continues the study of new trends begun by Gottlieb by considering technological change in particular as a "determining force in the evolution of a diversified process of world order." First, he takes note of two trends. One is represented by the supplementing or replacing of "traditional processes of international law-making . . . by a swiftly pulsating interplay of rising and falling norms of international behavior." This fills in the "normative vacua" that derive from the "relative weakening in the power of the treaties and of codifiable customary rules as the chief pillars supporting the global system of order." The other trend is seen in the emergence of "streams of particularistic, diversified living norms, each individually made-to-measure, and all of them densely intertwined." Such norms "do not replace the universal and general rules of behavior of more traditional ancestry" but join them "in multitudes." "As a result," the author adds, "the traditional general and universal rules no longer are the hierarchical pinnacles towering over the lesser legal forms. They have simply become particles in an increasingly amorphous mass of normative phenomena." Slouka goes on to study the impact of technological development on models of "world order" and international normative processes, arenas and (state and nonstate) actors. The signals assembled "tend to support," in the opinion of the author, "the major conclusions others have arrived at by other means": namely, "that the variety of quasi-

² THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 362 (C. Black & R. Falk eds. 1972).

normative . . . forms and processes of order will be increasing, perhaps dramatically, with a corresponding increase of consensual as against contractual outcome" and

that such nontraditional normative events will become more significant as the quest for universal formal rules becomes more difficult and protracted, with the further result that the normative dominance of the nation-state will be reduced and that of other actors will be enhanced; the state may be losing not authority, but elbow room and ability to act unaided.

Finally, Charles W. Kegley, Jr. proceeds, in *Measuring Transformation in the Global Legal System* (pp. 173–209), to an assessment of rule formation "in the global community." For obvious reasons of economy, the author concentrates his investigation on "the relationship between systemic changes in interstate behavior, on the one hand, and changes in the global rules relevant to war and its control on the other." This is in order "to inspect the impact of the former on the latter and vice versa." With regard to *jus in bello*, he finds that "in the twentieth century declining attention to rules regarding the control of war is evident" (as compared to the 19th century), "the long-term increase in war's severity covar[ying] temporally with a long-term declining trend in the salience of war." With regard to *jus ad bellum* the author finds that "the most conspicuous trend has been the gradual but steady decline in the international community's tolerance of war." In spite of this, the author concludes, inter alia, that perhaps the most significant finding is the resistance of the international system to "rule modification." He also notes that in "global" law "behavioral change tends to precede legal change, that old legal doctrines tend to outlive the political system that precipitated and justified them, and that considerable portions of the body of international law lag behind fundamental changes in the international environment." A more general conclusion—one that might be considered to be that of the book as a whole—is that "[i]nternational law will not develop into world law until the global system makes the transition from an unorganized society to an organized community, or when the prevailing 'ordered anarchy' of the present global system is replaced by a system with more effective law-making and law-enforcement institutions."

In my view, this book—in which one finds much to learn—is indispensable for any lawyer or social scientist concerned with the future of international law (and not just lawmaking). I regret, however, what appears to be (perhaps to this reviewer) a certain lack of attention to continental European scholarship and an excess in the use of neologisms and otherwise sophisticated phrasing (a flaw felicitously reduced in Gottlieb's and D'Amato's essays).

There are points with which one might take issue: the notion that peoples or human beings have become, or are on the point of becoming, "subjects" of international law; the repeated confusion of *international* and *supranational* organizations; the conception of the *nature* of international organizations, particularly the United Nations, and of the abused

concepts of an "international legal order" and the "structural" changes it is said to have undergone. A number of the gaps, shortcomings and contradictions found in the international legal system are well described by Falk in the introduction to the book (and were treated also in an Editorial Comment in this *Journal*³). All of them, including the major gap that derives from the dramatic inadequacy of the system to cover the problem of the establishment of a just and effective international economic order, result from the fact that the system's rudimental *structure* remains unaltered in its vertical dimension, notwithstanding its horizontal "globalization."

The same questions arise, however, when one reads any of a broad range of contemporary books on international law. They do not reduce in any measure my admiration for the book at hand. I only regret the absence of a detailed subject index that might have done justice to the richness and depth of Onuf's essay and those of his partners. And I must register an objection to the overall format of the volume, which is quite different from that of the four Princeton volumes mentioned at the outset and makes this volume much less easy to read.

GAETANO ARANGIO-RUIZ

Xiandai guoji fa gangyao (Essentials of modern international law). By Liu Fengming. Beijing: Mass Press, 1982. Pp. viii, 236.

This is the second treatise on international law published on the Chinese mainland. Although shorter than the treatise edited by Wang Tieya and Wei Min,¹ this book does contain some useful information on Chinese theory and practice of international law. Moreover, unlike Wang and Wei's treatise, which deals exclusively with public international law, this book also covers private international law.

The book is divided into three parts, with two appendixes and a long supplement to cover certain recent developments. Part 1 (pp. 1-75) deals with general problems of international law and is divided into five chapters, which cover the concept of modern international law, fundamental principles of modern international law and the UN Charter, sources, subjects and the United Nations. With respect to the definition of international law, the author writes:

International law is the aggregate of various principles, norms and institutions adjusting the relations of struggle and cooperation among states, reflecting the adjusted will of the ruling class of various states and enacted through the agreements among states and to be maintained by the individual or collective [effort] of states [p. 4].

³ 74 AJIL 411-17 (1980).

¹ GUOJI FA (International law) (1981). Reviewed by this reviewer in 77 AJIL 978-79 (1983).

This definition is very similar to that of the Soviet writers of the 1960s,² who tended to ignore other subjects of international law such as international organizations and individuals. However, in his discussion of the subjects of international law, the author does not take such a rigid view and acknowledges that trust territories, the Palestine Liberation Organization and similar entities, dependent states and international organizations are also limited subjects of international law (pp. 55–56). However, he, like Wang and Wei,³ denies that individuals can be subjects of international law (p. 56).

The eight chapters contained in the second part (pp. 77–178) deal with territory, the high seas, residents (individuals), diplomatic relations, consular relations, the pacific settlement of international disputes, the laws and regulations of war, responsibility of states and international criminal responsibility. The author also discusses Chinese theory and practice at the appropriate points in each chapter.

There are two chapters in the third part, which is entitled "Chinese Private International Law" (pp. 179–202). The first chapter gives an overall survey on concept, principles, subjects, objects and other problems of private international law. The second (pp. 190–202) deals with some Chinese private international law problems such as status of foreigners in China, their property rights, patents and trademark problems, marriage and succession issues, arbitration, legal problems arising from joint ventures, and others. Appendix 1 (pp. 203–04) is a summary of general principles dealing with criminal cases involving foreigners under Chinese criminal law. Appendix 2 is a glossary of English-Chinese international law terms.

The supplement contains three interesting short essays. The first discusses the direction of contemporary international law. The author considers that Anglo-American international law theories can be divided into three schools: (1) the traditional school, as represented by Hyde and Fitzmaurice, which still adheres to the concept of state sovereignty; (2) the school that denies the existence of general international law due to ideological conflict, as represented by H. A. Smith⁴ and Kurt Wilk⁵; and (3) the expansionist school, as represented by Jessup, Corbett, Lauterpacht and Jenks, which attempts to elevate international law to "supranational law" and "world

² See, e.g., the following definition of international law in a 1964 Soviet textbook:

The aggregate of norms which are established by the agreement of states, including those with different social orders; express the wills of these states; regulate their struggle and collaboration on the basis, and in the interest, of the effective maintenance of peace and peaceful coexistence; and enforced when necessary, by collective or individual state action.

MEZHDUNARODNOE PRAVO (International Law) 8 (D. B. Levin & G. P. Kaliuzhnaia eds. 1964), cited in B. RAMUNDO, *PEACEFUL COEXISTENCE: INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM* 25 (1967).

³ See WANG TIEYA & WEI MIN, *supra* note 1, at 1, 267.

⁴ Author of *The Crisis in the Law of Nations* (1947).

⁵ Author of *International Law and Global Ideological Conflict*, 45 AJIL 648–70 (1951).

law" and to convert the United Nations into a world government with compulsory executive power. The author considers that this is the prevailing theory in Western international legal thought (pp. 226-28). The theory of Myres McDougal and his associates is totally ignored.

With respect to the Soviet theory of international law, the author alleges that the Soviet promotion of the "limited sovereignty" theory coincides with the Western expansionist theory in the service of promoting imperialist attempts to dominate the world (pp. 229-30). Ironically, despite China's identification with the Third World, except for a brief discussion of Yugoslav thought concerning international law (pp. 230-31), there is no discussion of Third World theories of international law.

The second essay deals with recent trends in the law of the sea as reflected in the Third UN Conference on the Law of the Sea (pp. 232-34). The third essay is the most interesting because it is related to a regional conference of the American Society of International Law on "Multi-System Nations and International Law: The International Status of Germany, Korea, and China," held in June 1981.⁶ At that conference, scholars from six countries discussed the appropriateness of using the more neutral term "multi-system nations," rather than "divided states," to describe the situation in Germany, Korea and China. Some participants considered this term more appropriate since it does not challenge the national goal of unification of these states, but merely reflects the factual conditions—the coexistence of Communist and non-Communist systems—in those countries.⁷ However, the author severely criticizes this concept as contrary to the "one China" principle advocated and practiced by the People's Republic of China (pp. 234-36).

In general, this book, though not as comprehensive as Wang and Wei's, does provide much useful information on Chinese views and practice of international law. However, in view of post-Mao China's tolerance of more academic freedom, some views expressed by the author in this book may not necessarily reflect the official position of the Chinese Government.

HUNGDAH CHIU
University of Maryland
School of Law

Essays on International & Comparative Law: In Honour of Judge Erades.

Presented by The Board of the Netherlands International Law Review. The Hague: T.M.C. Asser Instituut; Martinus Nijhoff Publishers, 1983. Pp. xi, 273. Dfl.95; \$41.50.

Judge Lambertus Erades is noted in North America for his chairmanship of the Lake Ontario Claims Tribunal. In Europe his fame stems from his

⁶ The proceedings were edited by this reviewer and Robert Downen and published in the Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 8-1981 (45), by the University of Maryland School of Law.

⁷ The question was first raised by Dr. Yung Wei of the Republic of China in Taiwan at a conference held in Seoul, so he was singled out for criticism by the author.

lifelong service on the Rotterdam Court of First Instance, from which he retired as Vice President in 1981. This *Festschrift* is focused on the two aspects of his career: (1) resolution of maritime disputes, many related to struggles between shipowners and labor unions, and (2) resolution of politically charged interstate disputes. It is the latter topic that will catch the eye of readers of this *Journal*.

Contrary to views of North Americans who primarily seek means of creating hard, enforceable international law, authors in this *Festschrift* argue the advantages of creating "soft law." By this is meant limiting the activity of tribunals to fact-finding and recommending, rather than issuing compulsory orders. Erades's opinion in the *Gut Dam* case of 1967-1968 is praised for not attempting to compel compliance. It found facts and declared law, but the final document was entitled a "final statement" rather than a "decision." An exchange of notes between Canada and the United States disposed of the dispute after they reached agreement on damages and cessation of further prosecution of claims—an agreement inspired by Erades's thinking as manifest in the proceedings. Erades is credited with similar skill in hastening resolution of a dispute between a contractor and the Sudanese Government, which had withdrawn during the proceedings only to think better of its role later and to reach agreement with the contractor on the sum to be paid in view of the tribunal's findings.

A. M. Stuyt of Nijmegen argues that this type of finding is in keeping with "a tendency in present international adjudication on the one hand, to ask the tribunal to state the law and on the other hand to leave the solution of the dispute to the parties themselves." In his view, the procedure is not ineffective because the tribunal's proceedings meet the primary need for a statement of law applicable to the facts found; on that basis, voluntary compliance is likely to follow, presumably because the loser sees the logic of the situation and finds it possible to maintain "dignity" through subsequent negotiation from a position of parity.

In amplification of this thesis, A. J. P. Tammes of Amsterdam suggests that the Final Act of the Conference on Security and Co-operation in Europe (the Helsinki Final Act) is in the desirable genre. Although not a treaty, and therefore not enforceable against signatories, it creates a code of conduct publicly proclaimed. Parties can adhere to it without losing "dignity" by being compelled to do so, and since it was publicly proclaimed, they will think twice before refusing to follow its code. He finds this method particularly suited to codes of human rights and economic cooperation, or the making of environmental rules. He likes the consensus method of adopting such codes, which permits acquiescence in the result while not binding those present by recording an affirmative vote. He is able to conclude that "for a participating state there is no way of denying the validity of rules which it has supported in an important public gathering."

"Soft law" is not to be confused with customary law, and the authors are careful to say so. Maarten Bos contributes a characteristically clear

exposition of how customary law is made. It has to be created through the voluntary conduct of states for some time before being recognized as a norm. It cannot be created instantly by a resolution or a code of conduct. Without saying so, these Dutch scholars seem to be prepared to accept the argument of socialist scholars of the East that the Helsinki Act has value even though it is admittedly unenforceable, but they would not accept the East's argument that massively supported consensus resolutions are hard law because they are by definition "crystallized custom." It takes time to create customary norms that are universally accepted as "hard law."

JOHN N. HAZARD
Board of Editors

Derecho Internacional Público. I. Principios fundamentales. By Antonio Remiro Brotons. Madrid: Editorial Tecnos, 1982. Pp. 341.

With this volume, Professor Remiro, currently dean of the Faculty of Law at the "Universidad Autónoma" of Madrid and the author of highly esteemed monographs on international law, commences a magnificent treatise, which will consist of several volumes, on this subject. Here, he examines with great realism and shrewd criticism the principles that should govern coexistence and cooperation among states: self-determination of nations, nonintervention, prohibition of the use of force, pacific settlement of controversies, cooperation for the development of the less-developed countries and the establishment of a "New International Economic Order." He adopts a "committed" attitude and an unusual style in legal prose, full of metaphors and imagery that may come as a surprise to some, but make for very pleasant reading. He refers to recent international events in Afghanistan, Kampuchea, the Middle East, Namibia, the Falklands, and discusses the limitations, contradictions and manipulations to which international legal principles have been subjected. As a Spaniard, it is natural that he should pay special attention to those places where Spain currently faces problems (Gibraltar, Ceuta, Melilla) or where it has recently done so (Sahara), defending the Spanish claim to Gibraltar with sound arguments, and refuting, on the other hand, the Moroccan annexationist theory regarding the above-mentioned Spanish North African cities and territories. Likewise, he supports the Argentine theory concerning the Falklands, and even dialectically defends the occupation of these islands by Argentina and rejects the British action against it, which he considers to be illegal for various reasons.

Perhaps the most valuable chapters of the book (all of them are very interesting and worthwhile) are those that discuss international cooperation, in particular the one that deals with the international right of development and the New International Economic Order, in which he shrewdly analyzes their basic ideas and examines the "principle of compensating inequality" and the diversification in this respect of the states' legal status. However,

the author's conclusion is extremely gloomy and pessimistic. For this reason, the reader cannot help feeling some discouragement at being confronted with an international panorama drawn with such stark realism, and with a law so powerless and inadequate to put right the serious wrongs that afflict mankind today. Nevertheless, this should not lead us, as jurists, to be skeptical or passive. That is not the author's aim, but rather the opposite. The good jurist needs these large doses of realism to stimulate him to action, however difficult this might be. There is no more sterile undertaking within the law than the attempt by certain jurists to force reality, often with great difficulty, into an a priori framework of categories, rejecting it if that proves impossible. On the other hand, the jurist, according to Remiro, by adopting a demythicizing and, to a certain extent, antidogmatic attitude, ought to "create at all times the necessary tools that reality calls for, discarding that which serves no purpose. . . . But being realistic does not always mean resigning oneself to reality, but simply providing a platform to fight against a reality we do not like, without our feet leaving the ground." His attitude should be similar to that of a good doctor who, on contemplating the seriousness of a patient's case, does not adopt the attitude of the ostrich and refuse to recognize such seriousness, but who, in view of his alarming and distressing diagnosis, hastens to find out its etiology and apply an appropriate therapy.

On the other hand, in order to understand completely the theses of this extremely important book, and to derive full benefit from it, one must keep in mind certain elements that are essential to its meaning and scope: Remiro's view that the basis of current international law resides in principles of *legitimacy*, as opposed to effectiveness and what is merely feasible; his continual call for institutionalization of the international community as both necessary and desirable; his concern, expressed on every page, for the safeguarding of human rights; his belief in the possible—though difficult—interdependence and solidarity among nations.

The book contains an abundant and well-chosen bibliography. However, an analytical index, which it lacks, would greatly facilitate its use.

JOSÉ PÉREZ MONTERO
University of Oviedo

System of the Law of Nations: State Responsibility. Part I. By Ian Brownlie.
New York: Clarendon Press; Oxford University Press, 1983. Pp. xvi,
302. Index. \$47.50.

The continuing work of the International Law Commission on the subject of state responsibility is again beginning to attract the attention and analysis that the subject deserves. Whether the ILC will produce the codification aspired to, in a form acceptable to governments and in a practically useful manner, remains to be seen. Many have already criticized the work as too great an essay in abstraction, while others keenly recall the failure of previous efforts; certainly, there has been a falling off of

of hijacked aircraft to damage to the property of nationals). Also included is a selection from the practice of international organizations. The whole not only demonstrates the strength of the concept of objective responsibility, but also the importance of particular rules and fact-situations as *evidence* of the existence of the necessary conditions for responsibility. Thus, the acts of private persons, of state organs or agents, can be seen to ground liability through the application of normal, unexceptional principles.

Responsibility in case of insurrection or civil war is shown to be essentially a question of due diligence, a somewhat low standard of care rather than an incidence of no responsibility, whereas the precise content of the duty in other cases may depend upon the fact of physical control or the foreseeability of harmful consequences. Joint responsibility and acts that have a continuing character are dealt with fairly summarily, no less and no more than what is due, and a final chapter covers at some length the forms and function of reparation. Here, with evident approval, Brownlie quotes the joint dissenting opinion in the *Nuclear Tests* cases to point up the nature, purpose and usefulness of declaratory judgments. He also examines recent, often conflicting, arbitral decisions and concludes that, while restitution has a place in the law, it is too inflexible to be regarded as of general application. Proposals now before the ILC support this conclusion. Draft Article 6 of part 2 (the content, forms and degrees of international responsibility) would still accord a priority place to the obligation of the wrongdoing state to "re-establish the situation as it existed before the act," with monetary compensation an alternative only where such is "materially impossible." On the other hand, a broader discretion *not* to reestablish the situation is contemplated in favor of the wrongdoing state by draft Article 7, where there is breach of an obligation regarding the treatment of aliens, "whether natural or juridical persons."² Brownlie concludes his final chapter with some examples of so-called direct injury to the state, which he finds otherwise unexceptional in the overall scheme of things.

The value of this book is enhanced by its three appendixes, which bring together the ILC draft Articles 1-35 (Part 1, "The Origin of State Responsibility"), the ILC commentary to draft Articles 20-22, which deals with that useful but often fuzzy distinction between obligations of result and obligations of means, and the text of Canada's claim against the USSR in respect of *Cosmos 954*. Altogether, this work provides a useful and sufficiently broad-ranging selection from the practice of states and tribunals, as well as the author's own persuasive analysis. Brownlie's writing remains clear and concise throughout, although on occasion the treatment becomes somewhat fragmented, perhaps by reason of the felt necessity to deal with the sporadic incursions and classifications of earlier commentators. The effect, though, breaks the continuity of thought and presentation. Necessarily, also, the approach is determined both by the subject and by the

² See W. Riphagen, Special Rapporteur, Fifth Report on the Content, Forms and Degrees of State Responsibility, UN Doc. A/CN.4/380, at 6 (1984).

American International Law Cases, 1969-1978. Vols. 21-28. Collected and edited by Frank S. Ruddy. Dobbs Ferry: Oceana Publications, Inc., 1980-1984.

Dr. Ruddy has successfully undertaken the herculean task of updating Professor Deák's original 20-volume work, which spans American jurisprudence from 1783 to 1968. Conceived as the American analogue to Professor Parry's British *International Law Cases*, and published in anticipation of the celebration of the 200th anniversary of the independence of the United States, this work sets out to collect and digest the decisions of that branch of the U.S. Government that has contributed the most to the growth of international law through its interpretation and application of that law.

The collection consists of decisions of various courts of law, including federal and state courts, the Court of Claims, the Court of Customs and Patent Appeals, and the U.S. Court of Military Appeals. Generally, decisions of regulatory agencies are not included. Cases are usually arranged in chronological order, with U.S. Supreme Court decisions followed by those of lower federal courts and state court decisions. Decisions are printed only at one place, based upon the editor's perception as to the primary focus of the court.

Ruddy, long associated with Parry, is well suited to continue the task commenced by Deák. A distinguished scholar, author and public servant, Ruddy brings a lifetime of scholarly and practical experience to the exercise. He has followed the organization of Deák's original volumes, with only a few noteworthy differences. The main difference is that in order to increase the usefulness of the cases, they are cited in their entirety.

To enhance accessibility, each volume has a table of contents and a table of cases. Cases are grouped according to the following major headings: "International Law in General," "Control of Resources," "Jurisdiction," "Diplomatic and Consular Intercourse," "Treaties" and "Control of Persons."

Ruddy has done the international legal community a great service by making the continuing international law opinions of the courts of this country accessible in a single collection to scholars here and abroad. He deserves the legal community's heartfelt appreciation for the manner in which he has carried out this worthwhile endeavor.

LEO H. PHILLIPS, JR.
Of the District of Columbia Bar

International Law: An Introduction. By Gary L. Maris. Lanham, New York, London: University Press of America, 1984. Pp. xiv, 481. Index. \$29.50, cloth; \$17.25, paper.

This book is designed for and is appropriate only for use in undergraduate courses or by lay readers. The author, a professor at a small liberal

arts college, sets out to examine not just the "rules" of international law, but "the theoretical, cultural and political aspects of the law" (p. v). His "main emphasis" is that "law, politics, coercion, etc. are . . . interlocked" (p. 33). Law students are not likely to find the book particularly useful, unless they missed out on such ideas completely as undergraduates. (Lawyers might be well advised to reconsider them, but there are better sources for that purpose.)

The contents reflect most of the standard entries in law school course books, while giving more attention, as promised, to theory, culture and politics. Certain features stand out: a guide for student research in international law; bibliographical notes at the end of each chapter; and a 65-page bibliography, listing reference material (e.g., digests, document collections), and selected cases, treaties, documents, books and articles. Thus, the author has made a determined effort to provide a basic reference book as well as an introduction to the subject. At first glance, the bibliography seems thorough, but a closer look reveals, for example, fewer than half of the cases of the International Court of Justice, and only four advisory opinions. Not all of these are even mentioned or cited in the text. Moreover, the author discusses the Court mainly in the context of "The Use of Force," the book's longest chapter, where he characterizes its work as involving mainly "lesser" conflicts (p. 351).

The legal analysis is concise, as was the author's intent, and is generally sufficient for its limited purpose. Somewhat bothersome, however, is the almost constant reference to other writings, many of them very recent, often making the book read rather like a review of current literature. The author is usually careful to present opposing views when he reveals a bias. And, though he spends a good deal of time on "non-legal" aspects of international law, he argues strongly that international law is indeed law. "To view international law as merely a set of ideals ignores its actual role in politics" (p. 363).

There are some factual and typographical errors (the book is printed from a typed manuscript), but only enough to irritate, not outrage. Similarly, the book has some merit, but just enough to satisfy, not impress.

RICHARD W. NELSON
Of the District of Columbia Bar

Encyclopedia of Public International Law. Instalment 3: Use of Force, War and Neutrality. Peace Treaties (A-M). Pp. xv, 299. 1982. *Instalment 4: Use of Force, War and Neutrality. Peace Treaties (N-Z).* Pp. xv, 377. 1982. *Instalment 5: International Organizations in General. Universal International Organizations and Cooperation.* Pp. xv, 427. 1983. Edited by Rudolf Bernhardt. Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law. Amsterdam: North-Holland.

Part of a projected 12-volume set, these three recently published releases are, respectively, a two-volume group on hostile interstate relations

and associated questions, and a volume on international organizations. Each volume contains approximately one hundred entries. The installments on the use of force are divided fairly evenly between questions relating to the laws of war, such as contraband, neutrality and reparations, and specific treaties or historical incidents such as the Corfu Affair and the Nuremberg Trials. The installment on international organizations addresses those that are active today, as well as the major defunct ones such as the League of Nations, but it also includes several significant historical occurrences linked with the development of the modern international organization such as the Bretton Woods Conference of 1944. The entries are often quite detailed and, despite the large number of contributors, consistent in format. Typically, an entry will begin by offering historical background, then move on to discuss all the important technical details overlooked by general works, but which are essential for understanding the subject, followed by an analysis of the subject's relation to the development of international law and the course of international relations in general. Entries often conclude by noting the contemporary political or economic implications of their topic, and a bibliography is invariably attached at the end; the quality of the latter is generally good, and bibliographies serve as an introduction to a deeper study of the subject in question.

The articles run from less than a page to more than a dozen; the attempt to be comprehensive in each entry clearly has restricted the number of entries that could be included. As a result, the editors occasionally have had to limit their selections: the Munich Agreement of 1938, for example, is included, while the Molotov-Ribbentrop Pact of 1939, which helped to trigger the Second World War, is ignored. Yet the latter has no less significance than the former for contemporary international law and politics. In another case, articles on *Pacifism* and *Historical Movements Towards Peace* appear almost side by side; here, one entry could have done the work of two. The writing style is excellent throughout the three installments, and many difficult issues such as those raised by the Nuremberg Trials are handled tersely yet comprehensively. In some cases, however, the writers are given an impossible task: how can the devilishly complicated issue of arms control be adequately treated in only four pages? The contributor, Hans-Joachim Schutz, devotes the bulk of his article to quite a comprehensive list of the arms control measures that have been agreed to in the recent past, which is certainly helpful, but the final section, "Arms Control: Evaluation," requires a longer and deeper treatment than it actually receives. All these, of course, are seemingly minor problems that are almost unavoidable in a work of this scope.

The amount of scholarly effort and the rigorous attention to technical detail contained in these volumes are most impressive and, if continued throughout the forthcoming installments, are likely to make the entire set indispensable to the serious student of international relations and law. For instance, volumes 3 and 4, which deal with the use of force in international relations, constitute a magnificent tour de force of four general categories of issues. First, there are well-focused overviews of almost all the major

international political agreements in the 20th century. Second, one finds extended discussions of all the major legal principles and rules that are part of the laws of war (*jus in bello*). Third, many of the entries deal with legal concepts in both the *jus in bello* and the *jus ad bellum* that are difficult to define with intellectual precision: unfriendly act, trading with the enemy, perfidy, *casus foederis*, economic warfare, sequestration. This work, unlike many others, succeeds in clarifying their meaning with as much exactitude as possible, while illuminating their relationship to the wider body of international law. This is, indeed, one of the most valuable aspects of the work. Fourth, major legal cases and international incidents related to the development of international law (*The Altmark*, the *Singapore Oil Stocks* case, *Ex parte Quirin*, the Rhineland occupation after World War I, the Tokyo Trial) are addressed and carefully probed.

The continental influence on these two volumes is clear; a great number of the writers are German legal scholars, a good many others British and American writers whose thinking has been influenced by the Germanic scholarly tradition in international law. One of the salutary consequences of this is that instead of the highly subjective, sometimes vague, discussions of political and legal norms that characterize much of American international legal scholarship under the rubric of "policy-oriented jurisprudence," what we have in these works is a tough-minded effort at presenting and thoroughly analyzing the legal rules and principles as they actually stand and not as the writers would prefer to see them stand. This is international law in its most precise, intellectually rigorous formulation, and for this reason legal practitioners and diplomats will find these volumes most useful. However, one does not find an arid positivism permeating the work. The discussions of legal rules and principles always address their political implications and their ongoing development in today's rapidly changing world. These discussions provide a refreshing note of realism. A notable example is the erudite note on nonaggression pacts by Jörg Manfred Mössner, who acknowledges the severe political limitations and discredited historical record of such legal instruments.

Volume 5, on *Universal International Organizations and Cooperation*, maintains the high standards set by the volumes reviewed above. All of the major contemporary universal international organizations are discussed in great detail, including some of the lesser known ones such as the OPEC Fund for International Development, the International Hydrographic Organization, the International Committee of Military Medicine and Pharmacy, and the International Children's Center. (Regional organizations are reserved for the forthcoming sixth volume of the *Encyclopedia*.) There are also skillful discussions of major concepts integral to an understanding of international organizations: weighted voting, strategic areas and the veto are a few examples. Each article in this installment provides an up-to-date review of the history, purposes, structure, membership, activities and major political and economic dimensions of the organization. While this volume cannot be as thorough as a standard multivolume series devoted solely to international organizations, such as the 1979 edition of

Peaslee, it does an adequate job of covering the most important aspects of the subject. In conjunction with the entire *Encyclopedia*, which covers the broader subject of public international law, this installment represents a valuable investment for any library, personal or public.

ALBERTO R. COLL
Georgetown University

The State as Terrorist: The Dynamics of Governmental Violence and Repression.

Edited by Michael Stohl and George A. Lopez. Westport: Greenwood Press, 1984. Pp. viii, 202. Index. \$29.95.

The editors of this challenging and provocative volume assert that it represents one of the first attempts to analyze state or regime terrorism in a scholarly fashion, studies such as those by Walter, Dallin/Breslauer and Plate/Darvi notwithstanding. Terrorism, including state-directed political violence, is defined as "the purposeful act or threat of violence to create fear and/or compliant behavior in a victim and/or audience of the act or threat." The overall mode of analysis emphasizes ideological thought, governmental mechanisms and national examples. Stohl and Lopez carefully stipulate that they are not merely cataloging human rights abuses of particular regimes on the one hand, nor are they attempting to duplicate the seminal works of Hannah Arendt on the other.

Actually, their technique is rather straightforward, though the content of several chapters is somewhat unusual. Following an introduction that emphasizes definition and briefly points up the focus of all contributing authors, there is a chapter on social science conceptualization (McCamant); a chapter on regime terror and the international political system (Stohl); one on the typology of state terrorism (Lopez); one on political repression in Latin America (Sloan); a curious digression to political economy in Argentina from 1955 to 1980 and its arguable relation to repressive terror (Pion-Berlin); a survey of Marcos's militarism in the Philippines (Zwick); a socioeconomic approach to South African repression (Denemark and Lehman); an extreme radical-theoretical hodgepodge of so-called government terror in the United States as it relates to the American sociopolitical system (Homer); and a reflective concluding analysis of each contribution, which attempts to lay out a future research agenda for the study of state terrorism (Lopez and Stohl). There is also a short bibliographical essay that merely highlights some of the landmark studies in the fields of totalitarianism, genocide and human rights.

The book suffers from the ailment of most multi-author studies in that the main theme as put forward by the authors is dissipated by the somewhat disconnected subject matter of the individual chapters. The overall quality of both style and scholarship is uneven, a recurring problem of studies that consist of many authors writing under a general theme. The editors' introduction is an intriguing one that raises a number of valid issues, not necessarily explored in either depth or breadth by the succeeding chapters. Their conclusion is a thoughtful and sophisticated

essay that merits greater expansion in its own right. Legal aspects and the quite considerable legal literature on the subject of state violence and terrorism are largely ignored, except for the editors' short reference in their introduction to UN debates on terrorism.

There is almost no reference to the U.S. Government's definition of state-supported terrorism, which centers on states involved in carrying out international terrorist acts—the prime examples being Libya, Iran and Cuba (barely noted in the contributions mentioned above). Brazil, Argentina and Jeane Kirkpatrick are singled out for much criticism, but Kirkpatrick's famous distinction between totalitarian (left) and authoritarian (right) regimes has the weight of recent history behind it. Witness the democratization occurring in Argentina, Brazil, Uruguay, Honduras and El Salvador, as well as the collapse of the Somoza dictatorship in Nicaragua. To equate Watergate with state terrorism, as does Homer, is not worth further comment.

This book is significant because of its aims, its social science orientation and the thought-provoking contributions it contains. Its impact is questionable because of the authors' disparate approaches and the polemics found in several contributions. The legal specialist in this important field, however, should not ignore what is occurring in the social sciences. *The State as Terrorist* is as good a place to start as any.

ROBERT A. FRIEDLANDER
Ohio Northern University

Judgment in Berlin. By Herbert J. Stern. New York: Universe Books, 1984.
Pp. 384. \$15.95.

Few works reviewed in these pages would be expected to attract bids for film rights. *Judgment in Berlin*, however, has sufficient intrinsic drama, irony, character development and narrative interest to prove an exception to this rule. And none of this should detract from its appeal to those concerned with international air piracy, the enforcement of international conventions in domestic legislation and their treatment in municipal courts, the domestic lawyer's view of the international legal system and the continuing, fascinating problem of the legal status of Berlin.

The background of the book will be known to many: an East Berliner's 1978 hijacking of a Polish airliner to a U.S. Air Force base in West Berlin, pressure from the Eastern bloc for a prosecution, Bonn's reluctance to have anything to do with the matter, the American occupation authorities' convening of a U.S. court in West Berlin (premised on the victory in World War II), the appointment of a sitting federal judge to the court and the ensuing trial on a charge of violation of West Germany's air piracy law. This book is the recounting of that story by the federal district judge who was chosen to be the U.S. judge for Berlin and who presided over the only case ever tried in that court—surely one of the more curious trials in modern times. International aspects aside, the case would have

been little more than just another criminal prosecution, though Stern's candid revelations of his judge's-eye perceptions of counsel and their tactics, his admission of his desire for a jury trial in order to shift certain problems from his back, his view of the jurors and his honest account of the difficult task of adjudication should hold some appeal for those interested in the process and practice of judging.

However, it is the unusual international aspects of the story that are of concern here. The convening of an American court in contemporary West Germany gave rise to numerous unusual problems, large and small, and no one was in a better position to record how they were dealt with than Herbert Stern. The uneasy meshing of two domestic systems—American criminal procedure and West German substantive law (including a gun law promulgated by Hitler!)—is the story's continuing problem. The resulting awkwardness of the trial illuminates not only the artificiality of the substance/procedure distinction but also the gulf that exists between the criminal justice systems of different states, even if both are Western, constitutional democracies. Stern's description of the hearing contains fascinating views of the West Germans' encounter with justice American-style and of U.S. efforts to conduct a criminal trial enforcing foreign substantive law. For example, the explanation of elements of the American criminal procedure—*Miranda* warnings, U.S. constitutional guarantees of due process, *voir dire*s and so on—to the West Berliners chosen as jurors provides a scene that is truly without precedent.

But *Judgment in Berlin* does not only hold interest for those intrigued by the legal curiosities that arose in this unique trial or concerned with how the American legal system copes with certain international problems. The issues presented by this hijacking and prosecution brought to the fore the awkward legal status of West Berlin, a legal status strangely at odds with the reality of how the inhabitants of that city lead their lives. The continuing political problem of bringing refugee-hijackers to justice is also central to the book. West Germany had every wish not to punish anyone escaping from the East, even if their escape encompassed some domestic crime. This clashed with the interest of the United States in demonstrating its opposition to all forms of air piracy and Judge Stern found himself in the middle. The book's discussion of these international legal topics is not sophisticated. *Judgment in Berlin* is not written for lawyers and there are times when Stern's presentation of legal and political problems does not rise much above the level of a high school civics lesson. The book's strength is in its insider's view of an unusual unfolding of events and its perception of the impact on people of certain international legal problems. At times, *Judgment in Berlin* may be more valuable for what it unwittingly reveals than for what it purports to be discussing, but even then it contains useful material for legal scholars working in the fields it touches on.

VAUGHAN BLACK
Dalhousie Law School

Networks of Interdependence: International Organizations and the Global Political System (2d ed.). By Harold K. Jacobson. New York: Alfred A. Knopf, 1984. Pp. xxiv, 483. Index. \$22.95.

"This is an optimistic book, though I hope not an unrealistic one" (p. viii). Thus does the author forewarn the reader that making a case overtly favorable to international organizations is an uphill battle, going against the modern "conventional wisdom" (of some) that they are ineffectual, overpriced and generally antagonistic to Western values. This book highlights what is good about international organizations, asserting that on balance what is negative about them is easily outweighed by their positive contributions to the world community. In this second edition, the author is still optimistic 5 years after the first,¹ but is "more sharply aware . . . of how complex and difficult the problems are" (p. vii).

The book is quite thorough, readable and of generally high quality. It begins with a treatment of the nature and growth of international organizations (both governmental and nongovernmental) and of their functioning as political systems—the nature of their authority, structure of decision making and array of participants. Next comes an analysis of the role of international organizations in "formulating and implementing policies for the authoritative allocation of values" (p. 17), which focuses in turn on security, economic and social issues. Each of these sections includes a theoretical and historical overview, and a description of the activities of international organizations (informational, normative, rule-making, rule-supervisory and operational).

Throughout, the author also "attempts" to assess the consequences of the activities of international organizations. He acknowledges that "it is difficult if not impossible to establish causal links between the activities of international organizations and global developments" (p. 272). "We must settle for assessing broad trends" (p. 189), which he does largely by reference to various empirical studies or to raw data supplied by organizations or governments. Assessing the behavior of international organizations is also complicated by the fact that states use them for different, often conflicting, purposes. The author focuses on the manifest goals of the organizations, but also seeks out their latent functions.

In a concluding chapter on the future world order, the author holds that while sovereign states will remain the principal actors in international politics, their growing "enmeshment" in international organizations has "facilitated the development of consensus . . . and cooperation" (p. 392). "Effective power" in the global system is increasingly being exercised in the "complex web of international organizations," albeit in a decidedly "non-hierarchical manner" (p. 387).

The main strength of the book is the wealth of material it offers on a wide range of issues. Analytically, it is often tentative, by necessity, but nonetheless instructive. This edition differs from its predecessor mainly in the updating of tables and charts (now accurate to about 1982), which are

¹ Reviewed at 74 AJIL 697 (1980).

fairly numerous and quite useful. (The price has also gone up by \$8.) The ideas are unchanged, and the text is only slightly enlarged.

RICHARD W. NELSON
Of the District of Columbia Bar

Change Processes in International Organizations. By Lawrence T. Farley. Cambridge: Schenkman Publishing Company, Inc., 1982. Pp. 167. Index.

International organizations have become a prominent part of the webs of interdependent relationships between and among states. The numbers of such organizations, both intergovernmental organizations (IGOs) and inter-nongovernmental organizations (INGOs), have increased rapidly since the end of World War II as a consequence of accelerating technological changes, the decolonization process and the spawning by IOs of other IOs. Over time, as with any organizational structure, both IGOs and INGOs would be expected to undergo change as a result of both internal and external influences. The topic, then, of "change processes in international organizations" is an important one. To address the topic by exploring a wide variety of literatures is a worthy undertaking. Unfortunately, Farley's book fails to deliver on its promise.

Despite his early reference to internal changes and reforms, Farley chooses to confine his discussion to changes in what he describes as "organizational tasks." These are grouped into three categories: policy, allocative and integrative tasks, but no examples are provided to link the performance of such tasks to specific *international* organizations—an omission repeated throughout the book. Far more useful typologies have been developed elsewhere with specific application to IGOs.¹

The chapter on internal sources of change includes an innovative elucidation of dimensions of interaction among members and organizational personnel and the difficulties of interpreting the significance of different types of interaction. The terminology used is confusing, however, and insufficient effort is made to analyze the types of change within international organizations to which these patterns of interaction may give rise, and their relative importance. Among the external sources of change, Farley cites the "density of international organizations," alterations in national bureaucratic organization and function, and the emergence of new issue areas. For the latter, he develops a very nice example showing how the issue of outer space has led to the expansion of agendas in a variety of existing international organizations. While he alludes to informal organizations of scientists and professionals sharing data and research results on maritime matters, there is no analysis of how the existence of multiple IGOs dealing with related issues may lead to the emergence of transnational

¹ See, e.g., R. COX & H. JACOBSON, *THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION* (1974).

and transgovernmental networks with an impact on both IGO and national policies and policy-making processes.

Perhaps most frustrating to the student of international organizations is the failure to distinguish adequately between IGOs and INGOs and to consider informal patterns of organization, the narrow scope of the IGOs cited and the dearth of effort to link points systematically or even by suggestion to specific organizations. A large proportion of the key chapter on international organizations is devoted to the early Roman Catholic Church, the medieval fair and international (i.e., Florentine) banks. Reference is made to alliances, but no indication is given of when an alliance constitutes an international organization, as opposed to merely an agreement amongst states. A brief paragraph on functional organizations constitutes the only discussion of the proliferation of organizations in the 19th and 20th centuries. No reference is made to the variety of types of organizations that have emerged: regional, universal, single and multipurpose, political/security, economic, social, technical and functional.

While the author certainly delivers on the promise to draw from a wide range of sources, very few of those include works on international organizations from the last decade, e.g., works on informal patterns of international organization, transnational and transgovernmental networks, regimes and decision-making processes within organizations.

Analysis of change must be informed by a cognizance of the *direction*, *scope* and *intensity* of the processes described. It should also distinguish between unintended patterns and those that are intended by relevant actors. Farley's description of potential sources of organizational change is innovative and useful, but the reader is left with little clear understanding of the processes of change in international organizations.

MARGARET PADELFORD KARNS
University of Dayton

Legal issues of European integration, 1983/1. Law Review of the Europa Instituut, University of Amsterdam. Deventer: Kluwer Law and Taxation Publishers, 1983. Pp. 149. Dfl.55; \$22.

This volume, which consists of articles by friends and colleagues who wrote in honor of Professor Henry G. Schermers, the director of the Europa Institute of the University of Amsterdam, has as its central theme the problem of legal protection. The theme is interpreted broadly so as to include general aspects of the European Community's legal order such as the relationship between Community law and the national law of member states and the direct effect of Community law.

Following a personal tribute to Schermers and a general discussion of the rule of law, the several contributions are grouped under three headings: "General Characteristics of Community Law," "The Court of Justice" and "External Relations."

Two or three articles may be singled out for special notice. J. K. De Vree of the University of Utrecht provides a succinct and insightful

discussion concerning the development of law resulting from the interplay of order and disorder in political systems. The article *On Divided-Power Systems*, by Eric Stein of the University of Michigan Law School, draws suggestive comparisons between a mature federation (the United States) and a distinctive international organization (the EEC). Professor Stein concludes that, while the American system, because of its long history, may suggest a line of thought or a particular technique to the Community, the United States can learn valuable lessons not only from the weight accorded international agreements by members of the EEC, but also from the facility for judicial review of a treaty for "constitutionality" before it is ratified.

Lord Mackenzie Stuart's systematic analysis and discussion of estoppel in the context of Community law and English administrative practice will be of interest to practitioners in other legal systems, for the underlying principles that he sets forth are of relevance in a variety of legal settings.

While the degree of reader interest among the several articles will vary, on balance the volume as a whole makes a valuable contribution that will be appreciated on both sides of the Atlantic.

JOHN M. METZGER
Princeton, New Jersey

The Law of the Sea in a Nutshell. By Louis B. Sohn and Kristen Gustafson. St. Paul: West Publishing Co., 1984. Pp. li, 264. Index. \$10.

To those lawyers and law students already familiar with the Nutshell series by West Publishing Company, now including some 90-plus titles by recognized scholars in their fields, *The Law of the Sea in a Nutshell* is a welcome addition. It is of use not only to the law student who is encountering this vast area of the law for the first time, but also to the seasoned practitioner who needs a source book for quick reference to the detailed provisions of international conventions on the law of the sea, applicable citations to decisions of the International Court of Justice, international arbitrations, or U.S. legislation, regulations and judicial decisions bearing on the law of the sea. As the authors state in their preface, "this volume can only highlight the principal issues, and anyone requiring more detailed knowledge on any particular topic would have to resort to the many monographs and law review articles on the subject." With that limitation in mind, the authors give citations throughout the text to many of the books and articles, which provide quick reference to the available literature on various aspects of the law of the sea.

In 12 chapters, the authors, in clear, succinct prose, set forth the basic rules on the law of the sea, and indicate with citations to statutes and cases those areas where U.S. law is in accord or divergence. Chapters 1 and 2 deal with the nationality of vessels and the duties and jurisdiction of the flag state over its vessels, as well as restrictions on the jurisdiction of states over foreign vessels. Chapter 3 is a clear discourse on the methods for

determining the baseline from which the breadth of the territorial sea, the contiguous zone and the exclusive economic zone are measured, with discussions on the particular problems related to rivers, bays, islands, low-tide elevations and archipelagic states. Chapter 4 covers the difficult problem of boundaries between the territorial seas and continental shelves of adjacent and opposite states. Chapters 5, 6, 7 and 8 provide coverage of internal waters and ports, the territorial sea, the exclusive economic zone and the continental shelf, respectively. Chapter 9 deals with deep seabed mining both under the 1982 Convention on the Law of the Sea and under U.S. legislation. Chapter 10 covers maritime pollution, while chapter 11 deals with the six high seas freedoms: navigation, overflight, fishing, the laying of submarine cables and pipelines, the construction of artificial islands and scientific research. Chapter 12 discusses the mechanisms for dispute resolution of problems arising out of the law of the sea. Throughout the text, the authors meticulously provide multiple citations from the 1958 and 1982 Conventions and other sources. Quite helpfully, they also note where the major conventions are silent in their coverage of particular problems, and they provide possible answers through references to other treaties and national legislation.

The table of contents and index are designed for efficiency so that readers can quickly locate the specific pages applicable to their query. There is also an index for references made to articles of the 1982 Convention on the Law of the Sea, so that the reader interested in a particular article of the Convention can quickly locate the discussion on that article.

From the point of view of the practitioner, this book is not a treatise in which to seek long detailed explanations. Rather, it is a manual designed for efficient, fast reference to the basic rules of the law of the sea and to the applicable source material. It should provide a useful addition to the library of international lawyers.

CAREY N. GORDON

Of the Ohio and District of Columbia Bars

The Management of Marine Regions: The North Pacific. By Edward Miles, Stephen Gibbs, David Fluharty, Christine Dawson and David Teeter. Berkeley, Los Angeles, London: University of California Press, 1982. Pp. xxxiv, 656. Index. \$50.

Atlas of Marine Use in the North Pacific Region. By Edward Miles, John Sherman, David Fluharty, Stephen Gibbs, Shoichi Tanaka and Masao Oda. Berkeley, Los Angeles, London: University of California Press, 1982. Pp. v, 103. Index.

The book and its atlas constitute a tremendous achievement by the five authors in their effort to document the major marine policy problems

affecting the North Pacific region. The extensive coverage and in-depth analysis of the problems of the region represent no small undertaking. The members of the project team, led by Edward Miles of the Institute for Marine Studies, University of Washington, are all well-respected scholars and recognized authors on marine policy problems, specifically of the North Pacific. In their respective chapters they present detailed accounts of the problems facing the region, the history surrounding the exploitation of the resources, the methods of cooperation that have been tried and those that have viable potential, given the political obstacles confronting the decision makers.

The justification for designating this specific area as a region is based on the "pattern of activities and perceived policy problems" that the littoral countries of the North Pacific share in attempting to manage their marine resources. Moreover, the extensive usage and importance of the area, combined with the fact that this area "possesses the scientific and technological capabilities essential to rational management," makes the area a suitable model for exploring the viability of managing the resources of the North Pacific within a regional context.

The authors note that their primary focus is on "patterns of activities" and the "network of problems that involve the countries on the rim primarily with each other." The activities addressed in the text are fishing, marine transportation, scientific research and other multiple-use (e.g., petroleum production, oil pollution) conditions and conflicts. Under each of the activities, the authors begin with a review of the patterns of interaction under the traditional regime (high seas). They examine the existing regional arrangements and the attempt to bring national legislation into harmony with the requirements of the Draft Convention and they make an assessment of the implications of each activity under extended coastal state jurisdiction.

The authors make the point that, whereas in the past differences in legislation raised questions of reciprocity and retaliation, similarity in legislation could now lead to the creation of international law. Although a concerted effort is made in the text to advance the case of reciprocity and its contribution to the creation of international law, the case is at best a weak one. Reciprocity in this instance is too limited in its functional application to constitute anything more than bilateral arrangements. Only Japan and the Soviet Union, and the United States to some extent, place any emphasis on reciprocity. Even then, the focus is only on living resources. The fact that countries in the region have more often than not adopted similar maritime legislation does point to a general attempt to act in harmony with the provisions of the Convention.

Despite arguments for the creation of regional law, the authors generally ignore the provisions of the Draft Convention obligating states in a region to cooperate on a regional basis for the management of their living and nonliving resources. Instead, the authors emphasize regional law as it may develop from regional practices, reciprocity and multilateral or bilateral arrangements.

However, the focus of the book is not so much a case for regional cooperation as an analysis of management of marine resources in a specific region. Whereas regional cooperation seems plausible in living resource management and marine scientific research, in marine transportation and multiple use, the problems are of either a global (marine transportation) or localized (marine pollution controls) nature.

Despite its length, reading the book is not a difficult proposition. Its detailed analysis will ensure that this volume will become a leading text for further work on marine issues in the North Pacific. Besides, the accompanying atlas is packed with information on the description, distribution and trade statistics of living and nonliving resources, and with information on shipping patterns in the North Pacific. It is unfortunate that much of this information will lose some of its significance, since the data on which the analysis was made only go up to 1978, one year after the nations of the region extended their maritime zones.

There are an additional 130 pages of appendixes and footnotes containing lists of international agreements for the North Pacific fisheries, allocation agreements, the section of the Draft Convention on the Law of the Sea dealing with living resources in the exclusive economic zone, Japanese and Soviet legislation covering fishing in their respective fishing zones and a number of discussion questions concerning the proposed International Council for Scientific Investigation of the North Pacific. It is a tremendous undertaking and provides valuable information that is useful not only for the management of resources of the North Pacific, but also as a model for analyzing the management methodology of other marine regions.

DAVID A. SIMMONS

Dalhousie Ocean Studies Programme

The Law of the Sea. By R. R. Churchill and A. V. Lowe. Dover, N.H.: Manchester University Press, 1983. Pp. xxxiii, 321. Index. \$25.

The stated aim of the book is to fill a gap in the literature on the law of the sea by providing an up-to-date introduction in English to the subject as a whole. This gap is now amply filled by the two-volume work of the late Professor O'Connell,¹ which serves as both an introduction and a thorough study for reference and research purposes. Nevertheless, the book under review is much cheaper and, the overall quality being very good, is well worth purchasing at \$25 as an introductory text at the postgraduate or even undergraduate levels. With some reservations, the reviewer would also endorse the authors' hope that it might be of aid to those conducting scholarly research into specific areas of the subject, although it will be so in the area of conventional rather than customary law.

¹ D. P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA*, 2 vols. (I. A. Shearer ed. 1982 & 1984).

The book is well organized into 18 chapters, with useful tables of cases and conventions and an appendix setting out national claims to maritime zones. The introductory chapter and a chapter on baselines are followed by a logically arranged series of eight chapters dealing with each of the geographical zones or areas of the sea. Reflecting the Law of the Sea Convention itself, the remaining chapters take the alternative "functional" approach, covering specific use or use-related topics such as navigation and fishing.

One of the work's great strengths is that it assumes no great knowledge of international law and fits explanations of the concepts of opposability, the relationship between municipal and international law and the sources of international law into the text in a very instructive manner. Not only is the historical treatment of developments from the last century very good, but also the examination of state practice and the practical impact of the law in the real world is up-to-date and shows imaginative research beyond the confines of a "standard" international law text. The authors also display their excellence in a detailed analysis of the 1982 Convention, pointing out, for example, omissions or poor drafting, and the legal consequences of "overlapping" jurisdictions (for example, contiguous zone and exclusive economic zone, and continental shelf and economic zone or high seas). Chapters 1-4, 7 and 14 are particularly good.

The book covers a very wide area of law, and this excuses to a large extent a paucity of footnotes and brevity in discussion of certain matters. Nevertheless, it is surprising to see not only the occasional generalization and (in the reviewer's opinion) error in the text, but also one or two chapters, notably chapters 10 on the high seas and 16 on military uses, that fall far below the standard of scholarship shown elsewhere in the book. In addition, there are occasions when the authors do not emphasize sufficiently or omit dealing with an important matter, or fail to give authorities for controversial points.

In chapter 10 they do not address the issue of whether the High Seas Convention does in fact codify customary law. They are wrong here (and in chapter 1) to assume that the 17th-century "debate" on "*mare liberum*" versus "*mare clausum*" was a doctrinal exchange between Grotius on the one hand, seeking to vindicate the claims of Dutch companies to freedom of trade and navigation, and Selden, Welwood, etc., on the other hand. Grotius's *Mare Liberum* was in truth a (later disowned) young man's brief and an apologetic brief designed to assuage the indignation of certain Dutch East India Company shareholders for some of the company's actions. The "debate" continued well beyond the 17th century. The authors' explanation of the freedom of the seas does not emphasize the relative nature of the freedoms. It attempts to establish neither the meaning of "reasonable[ness]" nor the method of determining whether a use qualifies as a freedom or not. Treatment of the French nuclear tests incidents, flagless ships, the *Virginus* case, the French anti-Algerian-insurgency actions and the Cuban missile crisis is inadequate and misleading. American readers would like to know specifically why the authors consider the U.S. quarantine zone to have been illegal.

The authors do not, in chapter 11, appear to grasp the true meaning of "genuine link" as it refers to the nationality of ships; on the best view, the only requirement it imports is that the flag state effectively exercise its jurisdiction over its ships.² A third area of particular importance concerns passage through straits. The reviewer believes that the military importance of the straits provisions deserves more than an afterthought in chapter 16. Indeed, a thorough discussion of the underlying tacit agreement to avoid discussion of military issues at UNCLOS III and the effect of this on the provisions of the Convention would have been appropriate in chapter 16.

G. PLANT

The Fletcher School of Law and Diplomacy

Die 200 Seemeilen-Wirtschaftszone: Entstehung eines neuen Regimes des Meeres-völkerrechts. By Lothar Gündling. Berlin, Heidelberg, New York, Tokyo: Springer-Verlag, 1983. Pp. xiv, 370. Index. DM 98; \$42.30. English summary.

While the deep seabed regime failed to attract worldwide consensus, the 200-mile exclusive economic zone (EEZ) will, in all probability, turn out to be the most important new element in the international law of the sea. Lothar Gündling published this comprehensive treatise immediately after the end of UNCLOS III. The book covers the whole history and content of the EEZ concept as one single regime for the exploration, exploitation and conservation of all resources of the seas and seabed, as well as for all other activities involving economic exploration and exploitation.

The first, introductory chapter (pp. 15-37) surveys the postwar practice of extending coastal state jurisdiction in the form of continental shelves, fishery zones, environmental control zones and 200-mile claims of Latin American states. A second chapter (pp. 38-113) is devoted to the development of the EEZ concept; it starts with the regional initiatives of Afro-Asian, African and Latin American states between 1971 and 1974, and continues with an in-depth review of the whole legislative history of the EEZ concept as it unfolded during the 9 years of UNCLOS III, including the *travaux préparatoires* of the Sea-bed Committee, which began in 1967. This part reflects an enormous amount of research, as all the proposals and working papers—both official and unofficial—are evaluated step by step in the order in which they were generated by the 11 sessions of the conference and its relevant "negotiating" and "private groups" at various stages of the lawmaking process.

The same approach of providing well-documented legislative history applies to the third chapter (pp. 114-310), which deals with the legal order of the economic zone. Following the inner logic of the Law of the

² H. MEYERS, *THE NATIONALITY OF SHIPS* 110, 282 (1967).

Sea Convention of 1982, the author concentrates, in more than 150 pages, on the rights of coastal states in the EEZ, with various side glances at the regimes of the continental shelf, marine scientific research and pollution control. The rights of other states are treated in a short section of 25 pages, thus reflecting the "exclusive" character of the EEZ, which is rightly described as a "zone sui generis" in a further section on the legal nature of the EEZ. Special EEZ aspects concerning the settlement of disputes and delimitation problems are discussed in the broader context of the Convention.

A final, theoretical chapter (pp. 311–26) highlights the legal implications of the consensus reached at UNCLOS III, and the question of customary law. Gündling identifies the unique lawmaking process of the EEZ as a kind of parallel approach, with a lawmaking conference *and* accompanying state practice influencing and reinforcing each other. Under these circumstances, it would be premature to say that the entire regime has already become part of customary international law. In his view, resource jurisdiction can no longer be considered unlawful, but in respect to artificial islands, marine scientific research and pollution control, state practice still remains too rudimentary. In his final remarks, the author discusses political controversies over the EEZ. Instead of the often heard general appraisal that the Convention will have beneficial effects on mankind, he correctly states that only a few highly industrialized states will profit most from the new regime. In this context, one would have expected some facts and figures regarding the worldwide redistribution of marine resources and ocean spaces. Gündling concludes, however, by disagreeing with clichés like the "territorialization of the seas" and advocates instead bilateral cooperation with developing coastal states, financial contributions or transfer of technology in order to activate the opportunities of the new regime.

A reader might disagree with these optimistic conclusions, but the arguments are presented in a way that deserves serious consideration; besides, optimism is badly needed if the new law is at least in part to be viable. In sum, this is a scholarly work in the traditional (European) sense of the term, with a wide range of international literature and sources integrated into both the text and the numerous footnotes. It will appeal to all those who take an active interest in the emerging law of economic zones.

UWE JENISCH
Kiel

America Looks to the Sea: Ocean Use and the National Interest. By Douglas L. Brooks. Boston and Woods Hole: Jones and Bartlett Publishers, Inc., 1984. Pp. xi, 266. Index.

During the past quarter century, the United States has been increasingly concerned with issues of utilization and management of the marine environment, an area including the coastal zone, offshore waters and the

deep ocean. Production of both living and nonliving marine resources has grown substantially, as has the use of the ocean as a disposal area. Environmental concerns have also grown, along with worries about the nation's shipping policies, its military uses of the ocean and the rates of future growth of marine science and technology. Complementing these developments are the problems of management, particularly at the federal level, and the nation's attitude toward the evolving law of the sea. These topics are the subject of *America Looks to the Sea*, a concise and timely account of this country's marine-oriented efforts.

The author has worked in various capacities within Washington's "oceans community" since 1962, including 7 years as executive director of the National Advisory Committee on Oceans and Atmosphere (NACOA), a central forum for much of the debate on ocean policy. He has had personal experience with many of the players and issues in ocean policy formulation and execution, and this highly readable text is replete with references to leading figures and events in U.S. ocean affairs.

The contents are arranged topically, beginning with a review of oceanography in the United States, and continuing through considerations of fisheries, shipping, offshore hydrocarbons and minerals, waste disposal, coastal zone management, military activities and, finally, the law of the sea. Sandwiched between these chapters is one on federal organization for ocean development. In each chapter, Brooks presents data on developments during the past two or more decades, then outlines problems relating to future activities and, finally, presents his own recommendations on management issues. Inevitably, these recommendations include greater commitment of funds by the federal Government to ocean programs and closer coordination of ocean-oriented functions with the federal structure.

"The Congress discovered oceanography in 1960," the author writes; the immediate stimuli for this discovery were "a National Academy of Sciences Committee on Oceanography (NASCO) report, *Oceanography 1960-1970* . . . and a navy report, *Ten Years in Oceanography*," both of which appeared in 1959. Committees and subcommittees were subsequently established within the federal structure, among them the Interagency Committee on Oceanography (ICO), headed by an Assistant Secretary of the Navy and designed to coordinate federal agency programs in ocean research. Several years later, Congress established the short-lived Marine Council at the White House level to coordinate federal ocean programs and the Marine Sciences Commission, whose 1969 report, *Our Nation and the Sea*, recommended a broad national ocean program, including the establishment of a single agency to oversee the nonmilitary aspects of ocean affairs. In the book, Brooks skillfully guides the reader through the maze of ocean-related commissions, committees and councils that have existed for more than two decades within the federal system, as well as relevant legislative acts, together with their impacts on ocean programs. The result is the first comprehensive overview of national ocean efforts since the appearance in 1972 of Wenk's *The Politics of the Ocean*.

Several chapters are outstanding, one of these being the chapter on the

treatment of coastal zone management problems. Another is the chapter on energy from the sea. On the other hand, the theoretical issues brought up in the discussion of overall nuclear strategy seem somewhat out of place in this narrative of U.S. ocean commitments.

Repeatedly, the author pleads for increased federal funding of marine programs. He attacks the Reagan administration for proposed cutbacks in funding support for marine scientific research, harbor dredging and Coast Guard services, weather services, OTEC (Ocean Thermal Energy Conversion), enforcement of ocean dumping legislation and the Coastal Energy Impact Program, as well as the elimination of the Sea Grant College Program and NACOA. He finds fault with the "magic of the marketplace" concept, claiming that the marketplace "is particularly unsuited for determining values." Brooks also protests the Reagan administration's attempts at dismantling, rather than strengthening, the coordinated federal role in ocean management. For him, the goal of any reorganization efforts should be an independent department of the oceans within the cabinet, or, if this is not feasible for the program focus, "making the present Department of Commerce a Department of Oceans and Commerce, with all that that implies." Finally, the author does not support the Reagan administration's decision not to sign or otherwise support the Law of the Sea Convention: "To wreck or ignore the brilliant, dedicated, and all but completed effort of a decade to write a 'constitution for the oceans' now would be tragic."

One problem with the text is its seemingly excessive reliance on long quotations, many of them taken from NACOA's annual reports. In his search for support for the positions he adopts, Brooks has searched widely for reference materials—in newspaper articles, congressional hearings, journal articles and books. But there are no suggestions of counter-arguments. To some extent, the book is a polemic that combines facts with attacks on governmental policies (particularly those of the Reagan administration). Once the reader is aware of this, and can make allowances for the author's predilections, *America Looks to the Sea* will prove to be an informative, provocative and extremely useful review of this nation's commitment to the development of the marine environment.

LEWIS M. ALEXANDER

*Center for Ocean Management Studies
University of Rhode Island*

La tercera generación de Derechos Humanos y la Paz. By Diego Uribe Vargas.
Bogotá: Plaza & Janes, 1983. Pp. 196.

Professor Uribe is an eminent specialist in international law, greatly renowned both in politics in his own country, where he has held very important posts in the Government, and in the university, where he has equally distinguished himself as a professor. In his written work, his noble concern for peace and human rights is noteworthy.

In this book, Uribe studies the concept of the rights and liberties of

man, the "*jus cogens*" with respect to these, and finally, their so-called Third Generation.

Unlike the rights of the First Generation, corresponding to the individualist and liberal tradition and ideology, "opposable to the state," or those of the Second, corresponding to socialist tradition and ideology, "demandable on the state," those of the Third (right to peace, right to development, right to the environment and right to the respect of the "common property of mankind") are at the same time opposable to the state and demandable on it, and consequently, they can only be fulfilled by the "united action of all social subjects: states, individuals and other public and private entities." They are solidarity rights in the profound sense of the word and, according to Uribe, the new international instrument that contains and defines them will correspond to the process of bringing international regulations up to date. He declares that "human rights form part of the '*jus cogens*' and therefore, their protection and defense take on the nature of compulsory rules, rejecting all stipulations to the contrary."

The fact that new rights are emerging is the result of different circumstances that are transforming the international community and, in that light, "the right to peace," Uribe writes, "should be considered as a synthetical right on which the validity of the rest depends to a great extent and at the same time, it is both an individual and a collective right." The four rights of the Third Generation mentioned are interdependent with all the other rights and liberties of man, forming an indivisible unit, as proclaimed by the Instituto Hispano-Luso-Americano de Derecho Internacional and also inferred from the African Charter on Human and Peoples' Rights. Uribe concludes:

The interdependence of the rights of man and peace is a phenomenon that is proved every day, not only by the diplomatic acts of states, but in the work of international organizations. The catalog of individual duties will provide a necessary complement for the formulation of the third pact of rights in order to define the correlative obligations corresponding to each one. The unity of the three generations of human rights—projection and content of contemporary international regulations—should be read as the symbiosis that expresses the minimum requirements for the survival of mankind and nations.

Uribe's valuable contribution to such an important subject is enriched by a select bibliography with interesting documentary appendixes that refer to the right to peace, the right to the environment and the right to the respect of the common property of mankind, and also by the complete text of the African Charter on Human and Peoples' Rights, which recognizes the new rights studied in this book.

JOSÉ PÉREZ MONTERO
University of Oviedo

Human Rights: A Topical Bibliography. Edited by J. Paul Martin. Prepared by the Center for the Study of Human Rights, Columbia University. Boulder: Westview Press, 1983. Pp. xii, 299. Indexes. \$30.

The international law of human rights is a relatively young, but rapidly developing, branch of international law.¹ Less than a hundred years ago, a prominent scholar of international law stated, "states only and exclusively are subjects of the law of nations."² Today, it is generally accepted that how a state treats its own citizens is very much a proper subject of international law. Rights of the individual under international law have been the subject of multinational agreements, some of which have been ratified by an overwhelming number of states,³ of regional agreements,⁴ and of declarations, such as the Universal Declaration of Human Rights⁵ and the Helsinki Accords.⁶ Whether states in fact grant their citizens the rights provided for by these instruments may be open to question, but they clearly recognize an obligation to do so.

Paralleling the expanding international law of human rights, and perhaps serving as a catalyst for it, has been a rapidly growing literature in this area. *Human Rights: A Topical Bibliography*, by the Columbia University Center for the Study of Human Rights, provides a guide to that literature. The book is divided into seven general categories: I: General and Introductory Works; II: Philosophical and Theoretical Works; III: National and International Perspective; IV: Specific Rights; V: Related Topics; VI: Teaching Human Rights; and VII: Reference Works; and each category is further divided into many subcategories. It contains over seven thousand entries, listing some twenty-five hundred separate titles. It also includes a list of the names and addresses of organizations that provide documentary resource materials on a continuing basis. The introduction promises that the book will be updated by supplements.

The book does not, however, provide a comprehensive reference source. It is, according to the introduction, limited to "scholarly books and articles . . . in the English language . . . likely to be found in most

¹ See, e.g., Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1 (1982).

² 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 362 (2d ed. 1912). Compare 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 639 (H. Lauterpacht 8th ed. 1955) ("The various developments since World War II no longer countenance the view that, as a matter of positive law, states are the only subjects of International Law").

³ See, e.g., the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (which has been ratified by 92 states); the Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (which has been ratified by 121 states).

⁴ See European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221; American Convention on Human Rights, OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), reprinted in 9 ILM 673 (1970).

⁵ GA Res. 217 (III), UN Doc. A/810, at 71 (1948).

⁶ Final Act of the Conference on Security and Co-operation in Europe, done at Helsinki, Aug. 1, 1975, DEP'T OF STATE PUB. NO. 8826 (Gen'l Foreign Pol'y Ser. 298), reprinted in 14 ILM 1292 (1975).

university and large public libraries" (p. xi). Several works with which this reviewer is familiar are not included.⁷ Nevertheless, it should be of considerable assistance to students, scholars, teachers, lawyers and others working to implement human rights.

MALVINA HALBERSTAM

Benjamin N. Cardozo School of Law

Kernkraftwerk und Staatsgrenze: Völkerrechtliche, verfassungsrechtliche, europarechtliche, kollisions- und haftungsrechtliche Fragen grenznaher Kernkraftwerke. By Michael Kloepper and Christian Kohler. Berlin: Duncker & Humblot, 1981. Pp. 213. Summaries in English and French. DM 58.

This book presents a somewhat revised advisory opinion, which the authors rendered to the local governments in Germany's area abutting on France in connection with construction of a nuclear power plant at Cattenom. Potential, across-the-border damages hypothetically imputable to future operations of this plant located in the proximity of Luxembourg and West Germany are at the center of the authors' inquiry. Dividing it into four parts, Dr. M. Kloepper, professor at Trier University, wrote the first two, and Dr. C. Kohler, a Luxembourg lawyer, the others.

The concept of a "*nicht-Binnen*" (noninland) located nuclear power plant, introduced by Kloepper in part I, is the main tool of his investigation of the role of international law in decisions on the siting and operations of nuclear power plants. A difficulty with this approach is in finding a workable and internationally acceptable definition of "noninland" located plants. Otherwise, nuclear power programs in almost any West or East European country would be subject, in view of the political-geographic configuration of Europe, to some supranational authorization.¹ In this context, it is of some importance for international law to notice the standpoint of countries such as Austria, which would be most affected should the supranational authorization for noninland nuclear power plants be generally adopted. Unfortunately, Kloepper pays only scanty attention to it.² Kloepper, of course, admits, after an exhaustive scrutiny of the various risks of particularly large nuclear power plants that neither the size nor the siting of such plants is in any way restricted by international law. But he argues that a mutually equitable limitation of territorial sovereignty, a necessary prerequisite to a solution of the threat of trans-

⁷ See, e.g., G. DE FONSECA, HOW TO FILE PETITIONS ON HUMAN RIGHTS VIOLATIONS (1975); Int'l Aspects Comm. of the Individual Rights and Responsibility Section of the ABA, *An Analysis of the Procedures of the United Nations Regarding Individual Petitions with Respect to Human Rights*, 4 HUM. RTS. 217 (1975); Guggenheim, *Of the Right to Emigrate and Other Freedoms: The Feldman Case*, 5 HUM. RTS. 75 (1975).

¹ See 1980-1981 EUR. PARL. DOC. (No. 1-442/80) 7 (1981), mentioning that 33 nuclear power units in operation or under construction in the European Community were less than 25 miles from the national borders, and 15 of these units were about 6 miles from the borders.

² See note 106, at p. 49; cf. also notes 63 and 86, at pp. 34 and 40, respectively.

national damages arising from nation-states' nuclear power programs, can be derived from the principles of the internationally recognized good neighbor policy. He corroborates his viewpoint with ample references to the literature, notably in the field of international water and environmental issues. One would expect that in this context he would have also examined in depth a Belgian-French agreement about an expansion of a nuclear power plant at Chooz near the Belgian borders. This plant is to have the reactors of the same type and size as those at Cattenom. Therefore, the agreement, which reflects an actual approach of two neighboring countries to potential risks of nuclear power plants in their border areas, is clearly relevant for the international law aspects of Cattenom. Instead, Kloefer's advice is that a protest be immediately lodged with France to prevent the construction and planned expansion of this plant. But this seems to be a premature step in view of the admission that while preparing the advisory opinion, the authors remained uninformed about the French-German-Luxembourg consultations on Cattenom.³

Constitutional questions that may be raised by the operation of this plant in Germany are briefly analyzed by Kloefer in part 2 of the book.

In part 3, Kohler examines the siting of nuclear power stations in the frontier regions in the light of "European," i.e., chiefly Euratom, law. After a thorough and well-documented analysis, he concludes that nothing in that law prevents locating nuclear power plants in the proximity of borders of member states, although efforts to establish at least a mandatory consultation procedure in such cases have been intermittently made.⁴

Finally, in part 4 of the book, Kohler inquires into the issues of liability in cases of nuclear incidents. In section 1 of this part, Kohler looks at these questions from the point of view of owners of nuclear plants and conflicting municipal laws, notably those of West Germany and France. In section 2 he examines, within the framework of various international conventions, the absolute liability of individual states for nuclear incidents originating in their territory. As he points out, the basis for this liability is not to be found in a culpable activity but in efforts to balance internationally the burden of transnational damages. Kohler's documentation of his analyses in both parts is impressive.

There is no index. Nor is there a bibliography of quoted sources, court decisions or international agreements, which makes it difficult to orient oneself in the multitude of issues discussed. Yet the book is worth reading by all those interested in the transnational repercussions of modern technology on the concepts of international law.

JAY G. POLACH

U.S. Department of the Treasury, Retired

³ The French Conseil d'Etat rejected objections of some local German governments and individual inhabitants of the area against the *déclaration d'utilité publique* issued for the Cattenom plant and its further expansion. Besides, the French Tribunal administratif in Strasbourg rejected a similar action against the construction permit awarded to Cattenom.

⁴ For opposition to this idea in the Community Council of Ministers, see the answer to a question by Mrs. von Alemán in 1981 EUR. PARL. DEB. (No. 1-278/168) (Dec. 16, 1981).

Power and Protectionism: Strategies of the Newly Industrializing Countries. By David B. Yoffie. New York: Columbia University Press, 1983. Pp. xi, 282. Index. \$30, cloth; \$15, paper.

This is an excellent little treatise that is not well served by its title. The title and subtitle may easily be interpreted as meaning the book discusses the protectionist strategies (e.g., protection of "infant industries") that have been used and abused by many developing countries. On the contrary, it lays out strategies that have been utilized primarily by Japan and several "newly industrialized countries" (NICs) (South Korea, Taiwan and Hong Kong) in dealing with the two paradigms of the "new protectionism" currently practiced by the United States and Western Europe: so-called voluntary export restraints (VERs) and orderly marketing agreements (OMAs).

Professor Yoffie succinctly summarizes the background, negotiation and implementation of the VERs and OMAs that have been erected against textiles, color television sets, nonrubber footwear and automobiles since 1957, when the United States imposed the first significant post-World War II "voluntary" restrictions (on cotton textiles) on Japan. The United States instigated these procedures in order to mollify its domestic textile industry without openly departing from the nondiscriminatory regime of the General Agreement on Tariffs and Trade, which has avowedly been the cornerstone of U.S. trade policy in the postwar era. By combining flexible negotiating tactics that took advantage of internal conflicts in U.S. objectives and bureaucratic politics with foresight and agility in shifting production from the protected "sunset" industry (cotton textiles) to the blossoming artificial textile industry, the Japanese turned the 1957 VERs' quantitative limitations to their own advantage. As Yoffie's well-documented study shows, these and other techniques that were developed at an early stage by Japan and several Asian NICs have not only blunted the OECD countries' onslaught of more than a hundred OMAs and VERs over the ensuing generation, but have enabled these countries to increase dramatically the value, quantity and quality of their exports to the OECD markets as well as the rest of the world.

As this volume went to press in mid-1982, the early evidence led the author to conclude that the strategies developed and the forces at work in the earlier cases were producing similar effects under the 1981 VER on Japanese automobiles. Subsequent developments in the U.S. car market have confirmed his judgment. The immediate question today is whether this past will also be the prologue for the VER that in September 1984 President Reagan announced the United States would negotiate with foreign steel exporters. *Power and Protectionism* should be assigned reading for all parties interested in influencing the answer to that question.

For those who wish to look farther than today's battlefield, Yoffie offers his views concerning three alternative scenarios for the coming years: (1) a "slippery slope" on which the world slides into a serious global trade war as a result of inadequate structural adjustment in the world economy; (2) an eventual collapse in the structure of world trade after protracted

deterioration in that structure, which in turn is traceable to the decline of American hegemony (including the U.S. ability to buffer the capitalist world from external shocks and the U.S. desire to maintain an open world trading environment); and (3) a "slow maturing of modern protectionism" that is marked by a "tolerable" increase in ad hoc arrangements of the type described in this book. Yoffie makes a plausible argument that the third scenario is the most likely to transpire.

As the copious but not intrusive footnotes reveal, this thoughtful text is grounded in a wide-ranging study of the public record (including U.S. trade journals and English-language newspapers in the exporting countries), official records, private interviews with U.S. negotiators and other participants, and background reading in negotiating techniques and other relevant matters. Many of the author's assertions regarding the U.S. negotiators' intentions and thoughts are footnoted with references to interviews with either the individuals concerned or their colleagues. A selected bibliography at the end of the book contains some useful additional references.

JAMES C. CONNER
Washington, D.C.

Monetary Indexation in Brazil. Edited by Gilberto de Ulhôa Canto, Ives Gandra da Silva Martins and J. van Hoorn, Jr. Amsterdam: International Bureau of Fiscal Documentation, 1983. Pp. 202. Dfl.75.

From 1964 to date, Brazil has been reacting to apparently incurable inflation by resorting to monetary indexation. The Brazilian experience in linking by statute or by judicial practice the amount to be paid for pecuniary obligations to particular indexes is certainly the longest lasting on record and is at least as wide in scope as the judicial and legislative policy for the "revalorization" of debts followed in Germany during the aftermath of World War I. The book includes 11 essays by Brazilian authors and a bibliography. Though aimed especially at the foreign reader, it may also serve, as the editors intend, as a useful overview of the topic for Brazilian lawyers—hence its simultaneous publication in Portuguese.

Some of the essays consider the general aspects of the topic such as the relationship between monetary indexation and the legal tender of the cruzeiro, and monetary indexation in the law courts as regards pecuniary liabilities for which no indexation is set forth by statute. Other essays study matters upon which indexation is statutorily provided: accounting, taxation and tax debts, bank contracts, labor relationships. The opening essay, by Roberto de Oliveira Campos on the *Causes and Consequences of Indexation*, is a particularly well-balanced assessment of the pros and cons of indexation. According to the author, the Brazilian experience shows that indexation as such neither curbs nor exacerbates inflation, but that it "may be useful in permitting growth even under conditions of chronic inflation."

All the essays provide a wealth of information on a practice whose details are generally unknown outside Brazil. Some of them reproduce in English translation the relevant legislative or administrative texts, while others unfortunately do not do so. One regrets in particular that the often quoted law No. 6899/81 was not reproduced, as it would have enhanced the comprehension of various remarks in the essays on judicially created indexation.

No attempt is made to discuss this sector of Brazilian law from the viewpoint of conflict of laws. However, much of the information given can be utilized by the non-Brazilian lawyer to orient himself whether to classify the rules of the Brazilian law of monetary indexation as belonging to the *lex monetae* or to the *lex obligationis*: a dilemma that was the object of fierce discussion half a century ago in regard to the German revalorization practice.

TULLIO TREVES

*Italian Permanent Mission to the United Nations
State University of Milan*

New Dimensions in International Trade Law: A Canadian Perspective. Edited by Jacob S. Ziegel and William C. Graham. Toronto: Butterworths, 1982. Pp. ix, 211. \$41.95.

The economy of Canada depends heavily on international trade, but its legal literature on the subject is just emerging. This book is based on eight papers presented by five practitioners, a corporate counsel and the two University of Toronto law faculty professors who edited their own and the other papers, at a 1-day conference held in November 1980. Although the conference provided a forum for persons knowledgeable in the field of international trade law, it was designed largely as a continuing legal education course to provide information for neophytes interested in export trade law.

It was the second Canadian conference on international trade law to have its papers published, the first being a conference on the Tokyo Round of the GATT, sponsored by the Canada-U.S. Law Institute and held in London, Ontario, in May 1980,¹ at which 11 papers were presented on the different agreements reached in those Multilateral Trade Negotiations. Donald S. Macdonald, a former federal Liberal Cabinet Minister and now a Toronto practitioner, was the one person to present papers at both conferences, floating a proposal at the first one to establish a Canada-U.S. trade commission to enforce the MTN codes, and speaking at the second on foreign trade barriers to Canadian exports and on possible roles Canadian lawyers could play in overcoming or dealing with them.

As was the Toronto conference, the book is divided into two parts, one dealing with the private law aspects, and the other with the public law aspects of the export trade. It is rather annoying, particularly in the public law area where institutions, rules and practices have changed so rapidly

¹ NON-TARIFF BARRIERS AFTER THE TOKYO ROUND (J. Quirm & P. Slayton eds. 1982).

over recent years, to see the written versions of some of the papers updated to 1982, and others left with their 1980 text and information. It would have helped the reader if the writers or editors had used a consistent cut-off date in preparing their materials.

The proceedings open with a helpful introductory overview of export contracts, supplemented by six form agreements, prepared without end notes by Ivan Feltham, general counsel for Canadian General Electric and a former law professor. This is followed by a more esoteric but erudite 16 pages plus 114 end notes on the Vienna Sales Convention, presented by Professor Ziegel, a leading Canadian authority on commercial law.

Two papers prepared by practitioners focus on payment and financing mechanisms in international trade. Charles O'Connor writes on documentary letters of credit, the importance of providing attractive credit terms in negotiating transactions and the role of the Export Development Corporation in providing Canadian Government financial assistance programs in support of exporters. G. G. Sedgwick comments on the role of Canadian banks in export transactions, helpfully adding seven forms for illustration and elaboration.

Professor Graham, an internationalist in teaching and practice, treats the subjects of performance and bid bonds, the drafting of choice-of-law clauses and arbitration all in one paper, adding end notes, appendixes and a bibliography for good measure.

The book ends with two papers by practitioners that deal with problems of exporting to the United States. Warren Grover presents a Canadian perspective, and William Ince an American perspective. Although Ince updated his end notes, so many developments had occurred in U.S. legislation and administration between the 1980 conference and this 1982 publication that the two papers take on the patina of historical snapshots.

In conclusion, this work is worthy of mention not because of its overall intrinsic merit as scholarship or as a data base, but rather because it marks the emergence of an organized and coherent interest in international trade law within the Canadian legal community. Its appearance was followed in 1983 by a government discussion paper entitled *Canadian Trade Policy for the 1980's*, published by the Department of External Affairs. An additional development is that the Department of Justice has begun holding 1-day seminars on international trade law each October at about the time of the annual conference in Ottawa of the Canadian Council on International Law.

CHARLES A. MARVIN
Department of Justice, Ottawa

North-South' Dialogue: A New International Economic Order. Thesaurus Acroasium, Vol. XII. Thessaloniki: Institute of Public International Law and International Relations of Thessaloniki, 1982. Pp. ix, 700. \$70.

This volume includes the collection of lectures and of *travaux pratiques* by young scholars delivered at the 1981 Thessaloniki seminar on contem-

porary international law and relations. There are 13 lectures, from 20 to 40 pages each, and 12 shorter papers covering most of the subjects usually referred to in connection with the "New International Economic Order" (NIEO).

F. Parkinson, of University College London, writes on *The Law of Regional Development Communities: A Comparative Analysis*, with interesting comments on the different ideologies and aims of these groups; G. Zieger of Göttingen, writing on *International Economic Organizations*, focuses on the evolution from the Bretton Woods-GATT system to the changes brought about by the participation of LDCs; K. A. Nasir from Pakistan, a professor at Long Island University, writes on *North-South Dialogue: The Role of Islam in the N.I.E.O.*; W. Weber, professor of political economy at Vienna University, discusses *Problems of an Implementation and Socio-Political Implications of a N.I.E.O.*

Professor Röling of Groningen writes on *The History and the Sociological Approach to the N.I.E.O. and Third World*, evidencing how we are witnessing in the international society the same transition from "liberal law" to "social law" that affected domestic systems in the first half of this century. Professor Vojnovic of Belgrade deals with *Principles and Theoretical Foundations of the N.I.E.O.* and with regulation of TNCs from a political-economic point of view. Professor G. Marin of Bucharest devotes his paper, which is in French, to the NIEO and the Third Development Decade strategy. Professor K. W. Ryan of Queensland University deals with *International Trade Law and the N.I.E.O.* He focuses on the evolution of the GATT up to the 1979 Tokyo Round decision regarding the differential treatment of LDCs, as well as on commodity trade and TNCs. Professor J. du Bois de Gaudusson of Bordeaux writes in French on the challenge of the NIEO for public administrations in developing countries. E. Laszlo of UNITAR deals with the strategy of regional and interregional cooperation in NIEOs, while Professor Ioannou covers the sensitive area of *The New International Information Order and the N.I.E.O.*

Professor Fatouros's paper on *The International Law of the N.I.E.O.: Emerging Patterns of Norms* includes an interesting analysis of the unresolved antinomies of the NIEO (comprehensive economic planning versus free trade; universalism versus discrimination; nationalism versus internationalism) and of some positive effects stemming from nonbinding provisions such as the legitimization of states' conduct in accordance with them. Professor W. Verwey of Groningen deals with *The Principle of Solidarity as a Legal Cornerstone of a N.I.E.O.* He examines the way in which various instruments and organizations grant rights and privileges to LDCs in several areas, as a form of positive discrimination. He views this as essential to implementing the principle of solidarity, but points out the realm of "dualization" of treatment that results in present international economic law.

In the second part of the volume, this reviewer's interest was attracted by the papers of E. Kostantinov (Bulgaria) on the position of the socialist states towards the NIEO and of M. Machmoud Mostafa on Egypt and the NIEO. Papers by C. Valtirka on the Brandt Report, W. Kowalsky on the

patent system and developing countries, A. Mitroudi-Alexiadou on primary commodity trade and producers' associations in the light of the various UNCTAD conferences and the 1974 Charter, and P. C. Spiliakos on *N.I.E.O. and Migration: The Greek Case* are also interesting. Other notable contributions in this section include the papers (all in French) by A. C. Beraud (Argentina), *Le Système Antartique appartient-il au N.O.E.I.?*, J. Juste Ruiz on the legal regime of foreign investments in Spain, J. Margot on the Lomé Convention and D. Premont on the right to development.

It is impossible to go into more detail about each paper in a short review. The main value of this impressive collection of essays, beside their generally high standard, is the wide range of subjects covered, and the diversity of the contributors, both as to national origin and academic and professional background. Their differing points of view present us with a well-rounded picture of the content and relevance of the NIEO in today's international relations.

GIORGIO SACERDOTI
University of Bergamo

Anti-Trust and Restrictive Business Practices: International, Regional & National Regulation. Binder I. Compiled and edited by Julius J. Marke and Najeeb Samie. New York, London, Rome: Oceana Publications, Inc., 1983. \$85/binder.

The ambition of the editors of this series, as they inform the reader in the introduction, is to "provide the primary source materials [that] are of importance for a clear understanding of the issues related to international antitrust or restrictive business practices." Binder I contains the international and regional materials; subsequent volumes will focus on national legislation. The book begins with bilateral and multilateral consultation and cooperation agreements, including the important agreements between the United States and Australia, Canada and the Federal Republic of Germany and including the series of recommendations that have been issued by the Organisation for Economic Co-operation and Development. The second section is devoted to documents from the European Communities, both the Coal and Steel Community and the European Economic Community. Section C shifts from substantive competition documents to the group of multilateral agreements designed to harmonize procedures: the Convention on Service Abroad of Judicial and Extrajudicial Documents, the Convention on the Taking of Evidence Abroad, the Convention on the Recognition and Enforcement of Foreign Judgments and the OECD Declaration on International Investment and Multinational Enterprises. Finally, the last section contains UN documents, including notably a comprehensive set of the materials leading up to the United Nations Conference on Trade and Development Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

Since the volume contains literally no editorial material, it is difficult to review other than for errors of inclusion or exclusion. Asking the question what would one like to have handy, if a problem in this area arose, I found several omissions that could be bothersome. For example, although the editors reproduce Articles 85, 86 and 87 of the Treaty of Rome in the section on EEC competition law, they do not include Article 3, which guides the Court of Justice and the Commission in the interpretation of the Treaty as a whole. Articles 36 and 222 could also have been included without any difficulty. Since so many competition problems arise with respect to industrial property rights, these articles undoubtedly are consulted frequently by practitioners. A more general omission relates to materials from the developing world. This is understandable, since there is no true analogue to the OECD or the EEC. Nevertheless, the provisions of the Andean Foreign Investment Code that regulate competition (i.e., Articles 20 and 22, among others) would be of interest to anyone doing business in that part of the world.

The value of a book like the present volume is convenience. Unless it contains substantially all the international documents that the user is likely to consult regularly, there is no reason to include it in one's library. Under this standard, the book is generally successful. It seems doubtful to me that the average user will need quite so much detail on the background of the UNCTAD restrictive business practices code. On the other hand, the EEC regulations would be quite useful, if the volume is kept reliably up-to-date. The international law of restrictive business practices has been growing, as the national regimes have come closer together and as regional economic groups have elaborated their laws. My hope is that the editors continue to revise the volumes already issued, so that this will become a trustworthy and convenient source of the varied international documents pertaining to competition law.

DIANE WOOD HUTCHINSON
The University of Chicago Law School

Commercial, Business and Trade Laws: Hong Kong. Binder I. Compiled and edited by Agnes Yung. London, Rome, New York: Oceana Publications, Inc., 1982. \$100/binder.

Hong Kong has attracted worldwide attention because of the rounds of Sino-British negotiation that were held in Peking over the territory's future. As from July 1, 1997, the People's Republic of China will recover and assume sovereignty over the entire territory. Nevertheless, China has repeatedly reassured Hong Kong that it will, for at least 50 years after 1997, retain its existing system of law and legal institutions, save for minor alterations to eliminate its colonial vestiges. Implicit in such reassurance is China's acceptance of the coexistence of Hong Kong's present capitalistic system of trade and commercial laws. Against such a background, the Hong Kong legal system deserves to be scrutinized and this volume is assessed.

This loose-leaf publication consists of five booklets. Booklet 1 is an introductory digest and the other booklets are verbatim replications of Ordinances and Rules of Hong Kong, viz., the Companies Ordinance and Rules, the Partnership Ordinance, the Limited Partnership Ordinance and Rules, the Transfer of Business (Protection of Creditors) Ordinance, the Bankruptcy Ordinance and Rules and related rules such as the Meeting of Creditors Rules and Proof of Debts Rules. There is no annotation to any of this legislation.

The compiler has written a brief, succinct and, on the whole, accurate introduction. But, of course, even discounting the inaccuracies that do appear, it is obvious that the mere reading of such an introduction, coupled with the most conscientious study of the legislative instruments provided, would hardly equip a non-Hong Kong lawyer to advise his or her client on Hong Kong law and procedure. Local counsel would still have to be retained and consulted if advice on Hong Kong law were sought. And a Hong Kong lawyer, whether an academician or a practitioner, would not find the introduction useful, as it is neither analytical nor deep enough in perspective. Furthermore, the 12 ordinances and rules can be purchased at 15 percent of the price of this volume from the Hong Kong government publisher. More analytical commentaries on some of the legislative instruments, written by local authors, can be read in locally published journals and monographs. The publisher should have included references or a bibliography for further research. Another inherent deficiency of this kind of publication is the rapid obsolescence rendered by changes in the law, e.g., the rate of the property tax has been increased to 17 percent since 1984 (p. ix) and the corporation profits tax to 18.5 percent (p. ix), whereas the rate for both taxes at the time of publication stood at 15 percent. The Deposit-taking Companies Ordinance discussed in the introduction has undergone drastic and extensive amendments since 1983. In short, one doubts whether such a publication is of much value to the legal community in Hong Kong or elsewhere.

FRANKIE LEUNG
Of the Hong Kong Bar

Commercial, Business and Trade Laws: The People's Republic of China. 2 binders. Edited by Owen D. Nee, Jr., Franklin D. Chu and Michael J. Moser. Dobbs Ferry: Oceana Publications, Inc. Binder I, 1982; binder II, 1983. \$200/2 binders.

The volume of English-language literature on the laws and legal institutions of the People's Republic of China has grown at an astounding rate during the last several years. The accessibility of this information is a boon not only to practitioners in the area, but also to scholars who, though not readers of Chinese, would like to consider Chinese law within the context of their other endeavors. The task of scholars and practitioners has been greatly eased by the publication within the last 2 years of both

comprehensive bibliographies of Chinese law¹ and English translations of Chinese law and regulations.²

What is likely to become the most widely available collection of translated laws is the Oceana publication by three lawyers who are among the small group of American practitioners specializing in Chinese law. The two-volume set published last year is an expansion and update of a one-volume collection published in 1982. The volumes purport to be comprehensive in scope, and indeed include, along with the basic investment and trade laws,³ such tangential legislation as the Constitution, laws relating to administrative structure and civil procedure, and criminal law. The 1983 release also adds some materials on bilateral relations, and the table of contents promises (at an unspecified future date) further bilateral agreements and an additional volume containing forms and sample contracts. The editors and translators have done an excellent job in selecting, assembling and translating⁴ these materials, and there is little ground for complaint about what is included.

A greater concern is whether the materials are current. Even the new volume is already out-of-date, as it does not contain such important materials as the new Patent Law, the Regulations for the Implementation of the Joint Venture Law, regulations for the newer Special Economic Zones, or the China-United States Tax Treaty. The loose-leaf format was apparently intended to facilitate updating, but additional volumes and updates have been slow in coming. When the first set of materials was finally updated in November of last year, the new packet replaced the old materials in their entirety. Nearly one-quarter of the laws were new since 1982. Thus, the practitioner in particular should exercise great care in using these volumes, since Oceana has apparently decided to update

¹ Pinard, *The People's Republic of China: A Bibliography of Selected English-Language Materials*, 11 INT'L J. LEGAL INFO. 215 (1983); *Annotated Bibliography*, 22 COLUM. J. TRANSNAT'L L. 175 (1983); UNDERWOOD LAW LIBRARY, BIBLIOGRAPHY: DOING BUSINESS WITH THE PEOPLE'S REPUBLIC OF CHINA (1983).

² In addition to the present book, other compilations include 1 CHINA'S FOREIGN ECONOMIC LEGISLATION (1982); 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1982); P. CHAN, CHINA MODERNIZATION AND ITS ECONOMIC LAWS (1982); and F. DE BAUW & B. DEWIT, CHINA TRADE LAW: CODE OF THE FOREIGN TRADE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1982). The Oceana Publications collection is by far the most up-to-date and comprehensive.

³ The subject areas include constitutional law, the structure of government and the judicial system, the law of contracts, the regulation of foreign trade, registered offices, foreign investment (joint ventures), foreign investment (natural resources), foreign exchange control, taxation and accounting, special economic zones, arbitration, industrial property, transportation, labor law and environmental law.

⁴ The translations are mostly new ones prepared specifically for this work. There are no official English translations of any of the Chinese laws, but unofficial translations of most of the newer statutes and regulations have appeared under Chinese auspices in a volume by the Beijing Foreign Languages Press, and in the *Beijing Review*, *China Daily*, and other Chinese publications. The editors and translators, however, have chosen to retranslate these, apparently in an effort to assure overall consistency. While the original Chinese texts are not provided, the original titles and the date of promulgation are, assuring precise identification of the translated law.

sporadically (once a year, perhaps), rather than providing updates when important new legislation is promulgated.

The editors also acknowledge that there is much that cannot be included, since laws and regulations in China are often classified as *neibu*, or internal and confidential. Thus, while the Chinese may refer to additional legal constraints on terms of trade and investment, the laws and regulations that are the authority for such limitations are not public.

It is an event of note whenever the legal materials of a foreign nation become available in English. But a glimpse at these materials on Chinese law quickly reveals something of their *sui generis* character. Of the 90-odd statutes and regulations contained in the first release, only about one-third date from before 1978. Of the one hundred or so laws and regulations in force included in the updated volume, nearly three-quarters were enacted in 1978 or later, and the minority that were enacted earlier tend to be concentrated in a very few areas such as taxation, customs and labor law. As the materials are updated, this proportion is likely to grow rapidly. True, the editors acknowledge that the service, "while comprehensive in scope," has given emphasis to legislation adopted since 1978. But that emphasis is not at all distorting.

These volumes and others like them must be welcomed as something more than the translation of one country's laws. Though without history or commentary, they virtually constitute a case study of law and economic development. These are the laws that the most populous nation on earth, with one of the lower per capita incomes, thought would implement the policy of fostering economic development by the encouragement of trade and investment. It is not surprising that most of these laws were enacted in the last 6 years, since these policies, instituted under the "pragmatic" regime of Deng Xiaoping, reversed nearly four decades of the previous traditional Marxist-Leninist policy of self-sufficiency, not to say several millennia of Chinese history interrupted by an interlude of colonialist exploitation. So the publication of this volume returns us to the much mooted question, can and does law induce economic development? Can law and legal institutions overcome the traditional Chinese suspicion of law and foreigners?

This work does not purport to provide us with any answers to the hard and interesting question of the role of law in China, foreign investment or economic development. Its introductions to each section, and indeed to the work as a whole, are colorless and sterile. Some interesting history in the first set has been deleted in the second. One has the sense that, as often in this type of publication, one important consideration was not to offend. But these editors, and their translators, have performed a great service, which in the end cannot help but make some progress toward their stated goal of promoting understanding between China and the world business community.

Nonetheless, it is hard to escape the question of what this outpouring of legislation from China means. While China proceeded quickly on its legislative agenda, particularly with respect to legislation perceived as relevant to foreign investment, it would be hard to claim it proceeded

without due consideration. Many laws were drafted only after lengthy consultation with a corps of foreign experts (who, in most cases, gave their services free). Alternative models were considered. This is what they have produced, and the overall response in the West has been enthusiasm for the thrust and substance, albeit coupled with some dismay at the initial vagueness and generality, of the laws. Lawyers have flocked to Beijing in the expectation of business, conferences and seminars are held, and the money seems all but flowing in.

If we stop for a moment and think about this legislation, we should hardly be surprised that the reaction in the West has, in general, been one of approbation. What is the point of promulgating, amid great fanfare, laws designed to encourage foreign investment unless one is fairly confident that the response of the foreign investors and their advisers will be favorable? Every day, articles appear in the *China Daily* pronouncing the importance of law and the encouragement of foreign investment, and how China is adopting new management techniques. But the *China Daily* is written for Western readers, and one must at least raise the question of whom the laws are written for. This question becomes more acute when we notice that the progress made in promulgating laws in the foreign economic relations sector has far outstripped that made in the domestic area. And even the laws for foreign investors are so vague and full of lacunae, that the legal, political and economic culture, which holds the laws together, is in the end far more important than the laws themselves. We would not look at the Russian Constitution and conclude, merely on the basis of what is written, that there is freedom of religion on the Volga. One should be similarly cautious about concluding what prevails on the Yellow and the Yangtze.

This is not at all to suggest that the legal efforts of the Chinese have not been bona fide. After all, the exultation of the developing legal system has been made nearly as often in the Communist Party daily *Renmin Ribao* as in *China Daily*. And the education of lawyers has increased at least tenfold in the past few years. But the confidence that can be gleaned from legal development focused on encouraging foreign investment is limited. So it is not surprising that there has been disappointment on the part of the Chinese with the rate of foreign investment.

How much of an effect has all this legislation really had? That is a hard question to answer. Generally, a stable legal structure is more important to investment than to trade, and indeed most of the laws collected have application only to investment. As of the publication date of these volumes of translated laws, only about \$260 million of foreign capital had been committed for equity participation. This is indeed a paltry sum. It is unclear whether foreigners are testing the waters, or using small direct foreign investment in the hopes of realizing other goals such as opening trading markets.

There is hope that answers to the harder questions may emerge, as experience is gained in China and as more thoughtful scholarship is produced not only by legal sinologists in the West but by the Chinese as

well. The availability of the laws in a comprehensive volume will be invaluable to achieving a greater understanding, as it will enable persons who do not read Chinese, but have considerable experience in China, to measure their experience against what is written. What is the reality of joint venture in China? How is control exercised? What does dispute settlement really amount to in China? It is, in the end, the experiences of the foreign traders and investors that will determine whether investment will intensify. The laws are vitally important in creating the necessary framework for foreign investment, but the perception and memory of investors and their lawyers will play an even more critical role.

DAVID W. LEEBRON

New York University School of Law

MARSHA A. COHAN

Of the New York Bar

Implementing the Tokyo Round: National Constitutions and International Economic Rules. By John H. Jackson, Jean-Victor Louis and Mitsuo Matsushita. Ann Arbor: The University of Michigan Press, 1984. Pp. 223. Index. \$18.

The plan of this book is to take several constitutional documents—two being those of the United States and of Japan, the other that of the European Economic Community—and to analyze the effects of such “national” constitutions in the implementation of agreed international economic rules. In this case, the international economic rule to be set alongside the premises of the three constitutional regimes is the rule or rules of the Tokyo Round of trade negotiations.

Despite the subtitle, the book is almost entirely limited to trade rules, rather than “international economic rules.” Thus, though there is a glancing reference to Bretton Woods and some recognition of the International Monetary Fund and of the World Bank, treatment of subjects other than trade is distinctly limited. In the case of the World Bank, discussion centers on what is clearly not the center of World Bank activity, that is, on the International Centre for Settlement of Investment Disputes.

The book is a useful explanation of the legal frameworks of the United States, Japan and the EEC, and how such frameworks affect negotiation and implementation of international trade rules. It produces few new insights. Certainly, the failure of the U.S. Congress to ratify the International Trade Organization, into whose administrative and substantive format the GATT was intended to fit, and the problems of U.S. negotiators not only with the Congress but with the several states of the Union, is a tale already several times told. Nor is it much of a revelation that Japan has a system, which, however informal, closely ties government, business and banking together. (Mr. Matsushita does not give any recipes for dealing with that alliance from the viewpoint of those who may find it disquieting.)

Though the book contains few surprises or fresh viewpoints, it fulfills a useful informational purpose. At the same time, though this is not its purpose, it suggests that the comparative approach does not always yield golden nuggets. The negotiator is not likely here to find lessons that will help in future negotiations. The book also suffers somewhat from a tendency to explain what is about to be said, then to say it, then to explain that it has been said. This may be a function of the outline, which clearly preceded the work of the three authors.

SEYMOUR J. RUBIN
Board of Editors

Droit commercial européen (4th ed.). By Berthold Goldman and Antoine Lyon-Caen. Paris: Dalloz, 1983. Pp. xxv, 1123. Index. F.154.

The authors of this impressive and comprehensive manual of European commercial law in its widest sense are both professors of law at the University of Paris. The work is much enlarged over the third edition of 1975 because of the increase of European Community law and the decisions of the Community Court of Justice.

The sources of this law are the original treaties establishing the supranational region and its main organs, the Council, the Commission, the European Parliament and the Court of Justice, located in Brussels, Strasbourg and Luxembourg, respectively. These main entities have single authority for all markets provided for in the original treaties as well as for the special markets created in the course of the years such as in the fields of agriculture, transport and nuclear energy. The above organs and the many subunits created according to need in the most diverse branches of activities issue regulations, decisions, directives, recommendations and opinions. Obligatory acceptance and fulfillment are expected, e.g., for the general regulations of the Council and the Commission as well as for their directives, while recommendations and opinions are not binding on the members.

As the authors so clearly explain, in all these matters as well as regarding the decisions of the Court, member states of the Community are required to adapt their own national laws to the standards of the Community, unless national security or *ordre public* stands in the way of such adaptation. The authors are well aware that, made up as it is of 10 nations that are very different in every ethnic, cultural and geographic sense (with the Iberian countries waiting in the wings for admission), the Community faces continual threats to its cohesiveness and even its survival. The action of the Norwegian people in disavowing their own Government and refusing Norway's entry into the Community serves as a shocking reminder of the past. The diversity of the member states, of course, is also a barrier to any fast and easy assimilation and harmonization of the various laws and regulations of the member states that Community law may require.

The authors present and explain in masterful fashion how European commercial law has now brought much progress in the fields of access to the Community markets, the free movement of persons in them, and the

theoretical review of the classical conceptions of the principle. It contains a historical survey of the evolution of the principle and examines all grounds for criminal competence. It also analyzes conflict situations arising from concurrent jurisdiction, and suggests remedies for their regulation and settlement, while examining problems relating to the validity and enforcement of foreign penal judgments. The comprehensive study is amplified and clarified by comparative analyses of the internal penal law of several nations, by references to several international conventions and by comments on the decisions of international and national courts.

The second part (pp. 229-400) contains a critical analysis of relevant articles of the conventions of regional organizations—the Council of Europe, Benelux, the Nordic Council and NATO—that the author feels best illustrate the modern tendencies of international cooperation: those providing for the resolution of jurisdictional conflicts and for a more equitable and efficient administration of international criminal law. He approves articles that provide for a hierarchical system of competence¹ and that establish priority rules of competence² as a means of resolving jurisdictional conflicts. The author is critical of those conventions that require reciprocity and double incrimination, and he condemns the failure to respect the rule of *non bis in idem*—the civil law counterpart to the constitutional protection against double jeopardy. This part also includes a critical analysis of international conventions concerning drug trafficking and aerial hijacking, which provide for universal jurisdiction.

The best analysis is that of the European conventions of the Council of Europe,³ which, taken together, create the possibility of a veritable system of European criminal law. The interstate collaboration allows for the transfer of information in criminal proceedings, transfer of criminal proceedings, transfer of the execution of criminal judgments and transfer of the supervision of the criminal away from the state of the *lex loci delicti commissi*. Classical notions of the principle of territoriality are apparently made nugatory, but the author skillfully argues the case for an existing regional European territory. An American attorney would find extraordinary the degree of cooperation and collaboration of the Convention on Road Traffic Offenses, which allows traffic offenders to be prosecuted, sentenced, punished or have their fines collected in their state of residence, rather than the state of the traffic infraction. Such collaboration does not exist at the federal interstate level in America, or even at the county level within the State of New York.

¹ Arts. 31-34 of the European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, 1972 ETS 73.

² Art. 7 of the London Status of Forces Agreement of NATO, June 19, 1951, 199 UNTS 67.

³ European Convention on Extradition, Dec. 13, 1957, 359 UNTS 273; European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, 472 UNTS 185; European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, Nov. 30, 1964, 978 UNTS 227; European Convention on the Punishment of Road Traffic Offences, Nov. 30, 1964, 865 UNTS 99; European Convention on the International Validity of Criminal Judgments, May 28, 1970, 973 UNTS 57; European Convention on the Transfer of Proceedings in Criminal Matters, *supra* note 1.

The third part (pp. 401–39) is of only marginal value. It consists largely of statistical data, most of which are over a decade old. Similarly, the delayed publication of the thesis prevents an analysis of more recent European conventions on criminal matters.⁴ The scholarly work, however, is valuable to those interested in the principle of territoriality and to those working for greater cooperation, uniformity and integration in international criminal law matters. The book is important, for it welds the commonsense approach of Professor Donnedieu de Vabres, assigning preferential jurisdiction to the territory of the place of the infraction, together with the post-World War II spirit of Monnet and Schuman for the creation of a unified Europe.

JOSEPH P. MURPHY

Of the New York and Florida Bars

Der Ostblock: Entstehung, Entwicklung und Struktur, 1939–1980. By Jens Hacker. Baden-Baden: Nomos Verlagsgesellschaft, 1983. Pp. xxxi, 1047. Indexes. DM 298.

This massive study of the Soviet bloc is concerned mainly with its East European part. It pays little attention to the non-European members of the socialist system, except when broader issues of the system are discussed. It is mainly a historical study combined with an analysis of Soviet policy in Eastern Europe and use of the bloc by the USSR in the realization of its goals. The author, who has a distinguished record in Soviet studies, is mainly concerned with the evolution of the bloc in those terms. A description of the present organization of its Eastern European part is given in the last chapter.

This approach has dictated the organization of the book, which divides the period 1939–1980 into three parts. The first part (consisting of three chapters) deals with Stalin's imperial policy. Its first act was the Ribbentrop-Molotov Pact (August 1939), which outlined Soviet territorial boundaries in Poland and in the Baltic area. The next step was a series of agreements made with Western Allies, which sanctioned Soviet control of future satellites. One of these was the famous Churchill-Stalin percentage formula. Soviet policies of this period are described as the reorientation of the political, economic and ideological traditions of the entire area, and total control of the national economies of Eastern Europe and their exploitation by the Soviet Union.

For all practical purposes Eastern Europe was governed directly by Stalin. Communist parties, secret police, military advisers and, above all, the Soviet diplomatic network in the satellite countries served as channels of control. The degree of control that challenged the authority of the legitimate government caused the revolt and defection of Yugoslavia in 1948.

⁴ Two Protocols to the Extradition Convention, one Protocol to the Convention on Mutual Assistance in Criminal Matters and conventions relating to war crimes, the deprivation of the right to drive, the suppression of terrorism and the control of firearms.

The death of Stalin (1953) initiated a new period (chapters IV–VI). Stalin's lieutenants in Soviet dependencies either died or were removed from power. Khrushchev, with his de-Stalinization program, brought about a modicum of independence in the satellites themselves. The Council for Mutual Economic Aid was revitalized and the Warsaw Pact Organization became a factor in the joint defense system. A number of treaties have regularized the regime of Soviet garrisons in satellite territories. An important factor in the new situation was the Soviet-Chinese dispute, which weakened the Soviet position in the Communist camp, as demonstrated by the defection of Albania and its adherence to the Chinese alignment. Khrushchev's effort to bring the heretics before the tribunal of the world Communist movement ended in failure, as the Romanian leadership refused to endorse the condemnation of China.

The last part deals with the Brezhnev era, marked by the growing differentiation in the position of the member countries of the bloc. To assure uniformity, the Soviet Government underscored military and economic cooperation. The military alliance became an important instrument of propaganda and policy formation. At the same time, the program of economic integration was seen as another instrument of control. Thus, while formal political independence of the member countries was to be maintained, the bloc was to become a single economic organism tied to the Soviet Union.

Chapter IX, the final chapter of the book, examines the foundations upon which the Soviet bloc in Eastern Europe rests. Neither treaties and agreements concluded between the Soviet Union and the members of the bloc, nor party declarations, nor writings of Soviet authors offer enough material to provide sure guidance to define the bloc's nature. There is no uniformity to be found in the treaties. For example, Romania was able to avoid acceptance of the Brezhnev doctrine in its bilateral treaty of alliance. Constitutions of the member countries lend little information about the nature of the bloc. Neither do the frequently referred to principles of proletarian and socialist internationalism. The author also examines Soviet and Western definitions of the Soviet bloc and finds them wanting. Finally, he comes to the conclusion that the Soviet Union has no juridically established right to intervene militarily in the affairs of the Soviet bloc countries. The nature of the bloc, he asserts, is determined by the policy of the superpower. The Soviet Union's control of its affairs and its political decisions is the only element that matters (*Ordnungsmacht*).

This somewhat detailed presentation of the book's contents is essential to define its place in the extremely rich literature on the subject.

Basically, this massive work is a grand review of past writings, mainly from the historical and political point of view. The author acknowledges his debt to Zbigniew Brzezinski, who provided him with the methodological approach and parameters of the study. He quotes him frequently, and this reviewer has failed to find a single instance where the author would disagree with his opinions. At the same time, he is quite critical of the others.

A look at the very extensive bibliography (perhaps too extensive, pp. 937-1017, nearly 2,000 entries) reveals another important aspect of the work. With few exceptions, the literature and sources referred to are German or translated into German. Of the non-German references, American writings are fairly representative, though here also important items were omitted. Important French literature has been overlooked. Soviet writings, unless available in translation, are absent. For instance, books and articles by Tunkin—who rejected the concept of socialist international law, the thesis adopted by the author—are not referred to.

Another important aspect of the book under review is an almost total disregard for economic aspects in intrabloc relations. This has contributed to a somewhat static perception of the bloc, and an inability to see it as an evolving entity. The author rejects resolutely the term “commonwealth” for the bloc. Yet this term would suggest a disparity in the status of the component parts and their movement towards new situations. After all, it is evident, as the author himself demonstrates, that today’s bloc is different from what it was under Stalin.

The foregoing does not detract from the usefulness of this effort. The author relied on the contributions of other important German students of the bloc (e.g., Uschakov, Frenzke, Brunner and last, but not least, Meissner), who, in their numerous works, demonstrated great familiarity with documents and literature originating in the area. The book will provide the student of Eastern Europe and the Soviet Union with solid and reliable information; a Foreign Service officer will find it useful (provided he knows German) for quick reference (the excellent index will help there); and students working on a contribution to the subject may start by reading it.

KAZIMIERZ GRZYBOWSKI
Duke University

International Tax and Estate Planning. By Robert C. Lawrence III. New York: Practising Law Institute, 1983. Pp. 729. \$85.

This book is directed at practitioners engaged in counseling multinational investors on planning investments so as to conserve assets and transmit them in the manner and to the persons desired, while keeping the ultimate beneficial ownership confidential, minimizing taxation and protecting their investments against governmental expropriation. The author, a partner in the New York City law firm of Cadwalader, Wickersham & Taft, has spent 7 years researching and writing the material and more than 25 years practicing in this area.

The book is divided into eight chapters. Chapter 1, entitled “Conflict of Laws,” gives the practitioner an introduction to the concepts and issues involved in identifying and resolving choice-of-law problems to facilitate planning for clients with multinational assets and contacts. After surveying U.S. laws concerning domicile and judicial jurisdiction on original probate of a will, the author gives an overview of choice-of-law approaches. In the

conclusion of the chapter, he gives useful general suggestions on planning mechanisms to solve choice-of-law problems.

Chapter 2, entitled "Federal Estate and Gift Taxation of U.S. Citizens Living Outside the U.S. and Resident Aliens," contains a useful overview of the classification of persons for purposes of federal income, estate and gift tax. However, the 1984 Tax Reform Act already renders the portion on classification of residency obsolete, and points to the major area of potential improvement—a new edition and, even more importantly, regular updates, since the law and regulations continue to change dynamically.

Chapter 3, entitled "Federal Estate and Gift Taxation of Nonresident Aliens," begins by presenting useful planning considerations for persons about to transfer their residency. After a thorough discussion of the gross estate and situs rules, the chapter highlights the use of estate tax deductions and credits for the nonresident alien, rates of tax and expatriation to avoid federal taxes. At the conclusion of the chapter, the U.S. model estate and gift tax treaty is examined and there is a brief discussion of the estate and gift tax treaties that the United States has concluded. This section could be improved by more discussion and reference to existing U.S. estate and gift tax treaties.

Chapter 4, entitled "Jointly Held and Community Property," provides an overview of the common law and community property law systems of concurrent ownership and a discussion of (1) the effect of a change in the marital domicile or in the situs of certain investments; (2) some federal estate and gift tax problems associated with the different forms of joint and community ownership; and (3) suggested methods of planning for the migrant couple. The planning ideas are of particular utility to the practitioner.

Chapter 5, entitled "Sovereign Risks, Expropriation, and the Act of State Doctrine," after a discussion of the general principles of international law on expropriation and the act of state doctrine, contains a discussion of "flee devices" (by which a corporation or trust can expeditiously flee the state of its incorporation in a manner that will be recognized as legally enforceable by a court in the friendly state where the assets are located) and surveys the law of flee devices in tax haven jurisdictions.

Chapter 6, entitled "Bank Secrecy," discusses the ability of U.S. authorities to reach records in tax haven jurisdictions with bank secrecy laws, the legal ability of a foreign trustee to refuse to provide information and the vitality of constitutional and comity considerations under which the United States may not impose sanctions against the party or witness for failing to respond to court-ordered disclosure. The material in this chapter has changed so dramatically, with proposed regulations under the Bank Secrecy Act and several important judicial decisions and conventions, that it needs updating already.

Chapter 7, entitled "Trusts," provides background on the concept of trusts and the advantages of foreign trusts. A thorough discussion is provided on elements of foreign trust agreements. A useful discussion of the taxation of various types of trusts under U.S. tax law is given. The chapter also discusses the use of corporations in conjunction with foreign

trusts and U.S. tax considerations. U.S. antiavoidance rules and filing requirements and penalties are discussed. Several changes in both antiavoidance rules and filing requirements require updating. A useful discussion of patriation or decantation of foreign situs trusts is given. This chapter is very well done and quite useful to the practitioner.

Chapter 8, entitled "Wills, Administration, and the Revenue Law," sets forth the general principles of testamentary and intestate disposition of property, including the use of multiple wills and other complicating factors in the administration of a multinational estate. The chapter contains many good planning hints and practical discussion of potential administration problems encountered.

The book has two appendixes—on the summary of laws of forced heirship of certain Western European countries and on sample conditions for flee clauses. The book also contains an index and tables of authorities.

The book is a well-written exposition of a new area of international law that is growing in importance.¹ The author's long experience in this field and the many persons who assisted on the chapters make the book an excellent resource tool for practitioners and academicians. It is well annotated, so that it facilitates research as well as provides an overview.

BRUCE ZAGARIS

Of the District of Columbia Bar

International Organization and Integration: Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements. Volume II.B-II.J (2d rev. ed.). Edited by P. J. G. Kapteyn, P. H. Kooijmans, R. H. Lauwaars, H. G. Schermers and M. van Leeuwen Boomkamp. The Hague, Boston, London: Martinus Nijhoff Publishers, 1983. Pp. xxix + 976. Index. Dfl.330; \$143.50.

Book I of this publication dealt with the constitutional and related instruments of organizations of universal scope in the UN system. Book II is entitled "Other International Organizations and Arrangements"; part A dealt with the European Communities and the present volume, comprising parts B-J, covers other "Western" organizations and arrangements; those of "Socialist" countries; arrangements between "Western" and "Socialist" countries; organizations and arrangements in the Western Hemisphere, the Pacific, Southeast Asia, the Arab world and Africa; plus the Antarctic Treaty. A further volume will contain part K, "Functional Organizations and Arrangements."

The various parts of this volume (whose titles are on the whole self-explanatory) contain mostly the material one would expect to find such as the North Atlantic Treaty, the Charter of the Council for Mutual Economic Assistance and the Charter of the Organization of African Unity. There is also a good deal of rather less expected material; for

¹ Other books on this subject include W. NEWTON, *INTERNATIONAL ESTATE PLANNING* (1981); *INTERNATIONAL ESTATE PLANNING 1982* (Geller & Harris eds.); and *CURRENT LEGAL ASPECTS OF INTERNATIONAL ESTATE PLANNING* (Hendrickson & Stevens eds. 1981).

example, the Council of Europe is one of the 11 "other 'Western' organizations and arrangements" dealt with in part B; together with the Statute of the Council are to be found a number of related resolutions, the European Social Charter and appendix thereto, the European Convention on the Suppression of Terrorism and, most strikingly of all, the European Convention for the Protection of Human Rights and Fundamental Freedoms. Not only are its first five protocols (a sixth was adopted too recently to be included) also set out or integrated into the text of the main Convention; there are also extensive lists of the main cases decided under its various articles, as well as the rules of procedure of the European Commission of Human Rights and the Rules of Court of the European Court of Human Rights. Again, in the context of the Organization of American States, the American Convention on Human Rights receives similar treatment though, due to its recency, no table of cases is attached here (though the case law is discussed in the directory).

Although the coverage of this volume, then, is more than the merely constitutional, this is not to say that every relevant instrument is included. Thus there is no text of the treaty establishing the Organisation of Eastern Caribbean States—an unfortunate omission, since this document was one of those invoked to justify the invasion of Grenada in 1983. Other quibbles about inclusion or exclusion might be possible; on the whole, though, the coverage is admirably full.

As in previous volumes, the part containing each group of documents is preceded by a directory dealing with the relevant organization's or arrangement's background, establishment, status, membership, purpose and functions, institutional structure, finance and budget and activities, together with a selected bibliography. This material is extremely useful and often of high quality.

In a review in this *Journal* of an earlier volume,¹ I expressed reservations about the magnitude and cost of this series. These reservations remain; but for those willing to spend the money or otherwise having access to the series, the present volume will be extremely useful.

M. H. MENDELSON
St. John's College, Oxford

Basic Documents on the Soviet Legal System. Compiled, translated and edited by W. E. Butler. New York, London, Rome: Oceana Publications, Inc., 1983. Pp. xi, 394. \$35.

This book should be a part of even the most minimal collection on Soviet law. As Professor Butler points out in his introduction, major recent changes in Soviet legislation have made translations published during the 1970s hopelessly out-of-date. Libraries that can afford it should have Butler's multivolume loose-leaf collection, *Collected Legislation of the USSR and Constituent Union Republics*. It contains all the legislation that is in the present volume plus thousands of pages of additional material. The present

¹ 78 AJIL 523 (1984).

book is particularly useful as a supplemental text for students in a course on Soviet law. The one existing case book on Soviet law has room only for excerpts from relevant Soviet legislation. These excerpts do not give the student a proper feeling for the Soviet approach to codification, as embodied, for instance, in the Russian Republic Criminal Code, which the student will find translated in full in the volume under review.

The quality of the translations is uniformly excellent. The translator has avoided both the trap of using Soviet terminology unintelligible to the non-Sovietologist and the danger of using common law terminology for civil law or socialist law concepts.

Given the space limitation on the present volume, there was no possibility of full coverage of the Soviet legal system. The compiler has chosen to concentrate on four areas of the law: state structure, the legal system, foreign relations law and criminal law. Each piece of legislation selected is presented in full. The material on state structure includes the 1977 Constitution, and laws on elections, the organization of the Supreme Soviet, regional and local government, and the "People's Control" inspection agency, and rules on publication of laws. It also includes the Rules of the Communist Party of the Soviet Union, not a legislative document, but essential to an understanding of the governmental system. Taken as a whole, these documents give a good picture of the formal structure of the Soviet state and party system, an understanding of which is a necessary prerequisite to the study of how the system works in actual practice. The material on the legal system is particularly rich and includes legislation dealing with the various judicial bodies and on the role of the lawyer. It would be most useful as background material in a comparative course on the legal profession. Of particular interest to readers of this *Journal* will be the material on foreign relations law, which deals with the legal status of foreign citizens, COMECON, Soviet citizenship, boundaries and treaties. Finally, the full text of the Criminal Code is most welcome, since extensive amendments have made all previous translations obsolete. The translation includes notes giving the dates of amendment for each article that has been changed since the code was adopted in 1960.

This volume reflects not only Butler's notable translation efforts, but also the extensive technical and substantive law reform that has been taking place in the Soviet Union. As part of a larger project involving the publishing of a systematic *Code of Laws* for the USSR and each of the Union Republics, all areas of Soviet law are being reexamined, revised, and many are being recodified. Similar reform in the 19th century was the precursor of a long period of heightened legality, marked by the emergence of a courageous bar and an independent judiciary. The reader may speculate whether the reforms embodied in this volume presage such a flourishing of legality, or, instead, if the increase in the severity of repression marked by the numerous changes in the Criminal Code suggests a possible return to a darker period of history.

PETER B. MAGGS
University of Illinois

The Canadian Yearbook of International Law. Volume XXI, 1983. Edited by C. B. Bourne. Vancouver: The University of British Columbia Press, 1984. Pp. 449. Index. \$36.50.

Included among the eight articles of the latest *Yearbook* are three treating maritime questions, two that concern commercial relations and one each reviewing Canadian transnational cooperation, Israel and the West Bank, and the teaching of international law in Canada. There are also the regular sections on notes and comments, Canadian practice and cases in international law during the year 1982, and book reviews.

André Braën begins the maritime discussion with a study of Canada's control of foreign fishing within the Canadian exclusive fishing zone, focusing on the Atlantic coast. The establishment by Canada of a 200-mile fishing zone created some interesting legal, economic and political issues, although the Law of the Sea Convention, not yet in force, is seen as clarifying the role of the coastal state much along the lines envisaged by Canadian policy. Braën's study is enhanced by useful maps showing the East Coast fishing zones claimed by Canada as well as by tables showing the extent of foreign fishing in Canadian waters. The negotiations between Canada and France concerning the islands of St.-Pierre and Miquelon, made into a French enclave by the extension of the Canadian zone, are discussed, as is the interesting commercial trade-off of foreign fishing access to Canadian waters in exchange for Canadian access to foreign markets. Finally, the author discusses the Convention on Future Multilateral Cooperation in Northwest Atlantic Fisheries.

In the second article, David Vanderzwaag and Donat Pharand examine the legal implications for Canadian Arctic waters in light of the historic use of the Arctic ice (e.g., migration, hunting) by the Canadian Inuit. Native ice use as part of a traditional life style has important potential implications in light of the modern interest in exploiting Arctic oil and gas resources and achieving access to those resources via the Northwest Passage. Should Canada choose to allow Arctic transit, native rights and claims could serve as a basis for strict control. Alternatively, should Canada wish to close off the area to protect the fragile environment, the authors see several bases for Canada to claim complete jurisdiction over its Arctic waters based upon historic Inuit sea-ice use.

The third article, addressing maritime questions, is a study by Günther Handl that discusses the international liability of states for marine pollution. He shows that, while in nonaccidental marine pollution cases the international liability of states is decreasing in importance, there is a clear need for clarifying state responsibility for damage caused by accidental marine pollution. The state's accountability remains crucial even though private parties are increasingly assuming "risk-bearing activities."

Concerning international commerce, J. Maurice Arbour offers a tentative assessment of the 10-year record of the General System of Preferential Tariffs adopted by the Canadian Parliament in 1973 to aid developing countries trading with Canada by providing them with preferential tariff treatment. A discussion of how the system has functioned suggests that

while Canada could perhaps do more to aid the developing countries via trade relations, the GSP shows the commercial difficulties of trade between developed and less-developed economies. For example, the Canadians cannot be forced to buy imported items they do not need, and indeed, international commerce is not founded ultimately upon Christian charity but upon laws of comparative advantage.

Also in the commercial area, the essay by D. J. Albrecht provides an interesting discussion of Canada's foreign investment policy. Noting that Canada hosts more direct foreign investment than any other nation, the author examines Canada's protectionist sentiment to "Canadianize" its economy in light of its international obligations.

An article by Jean-Pierre Plouffe reviews the informal transnational cooperation that has developed in the past 60 years between departments and agencies of the Government of Canada and their foreign counterparts through the multitude of diverse international arrangements that have been concluded. Nonbinding under international law, these "gentlemen's agreements" have brought great flexibility and informality to the conduct of international affairs. The author feels that the Department of External Affairs, formally charged with conducting Canada's foreign relations, should take the lead in organizing, establishing ground rules for and publicizing the informal arrangements entered into by units of the rest of the Government.

The Israeli occupation of the West Bank is the basis for Yaron Butovsky's article assessing Israeli practice and judicial decisions relevant to the area in light of the law of belligerent occupation. Acknowledging the political controversy surrounding the occupation, the author perceives a positive role played by Israeli courts in administering the occupied territory and meeting the practical realities associated with long-term occupation.

The final article is the fourth and concluding installment of R. St. J. Macdonald's historical introduction to the teaching of public international law in Canada. The three previous installments appeared in the *Yearbook* during the 1970s.

FOREST L. GRIEVES
University of Montana

Die Internationale Politik 1979-1980. Edited by Wolfgang Wagner, Marion Gräfin Dönhoff, Gerhard Fels, Karl Kaiser and Paul Noack. Munich and Vienna: R. Oldenbourg Verlag, 1983. Pp. xvi, 454.

The usefulness of a scholarly work is, to a considerable degree, a subjective quality, contingent upon the reader's knowledge of the subject and prejudiced by his expectancy of potential benefits in reading that work. It is therefore difficult to judge here the value of the 1979-1980 issue of *Die Internationale Politik*, particularly if it is reviewed as an isolated volume and not as a link in a series of yearbooks.

This 14th yearbook of the Research Institute of the German Society for Foreign Policy is a collection of essays grouped into eight chapters and organized essentially along regional and country lines, covering major political events of 1979 and 1980. Consequently, analytical quality varies from very informative essays on Western Europe (ch. 5, pp. 237–89)¹ to a cursory presentation of China after Mao (pp. 390–402). Readers could also wish for a more detailed background analysis of the Camp David Accords (pp. 126–41) and for a greater recognition of the role the Catholic Church played in the 1979–1980 turmoil in Poland (pp. 195–208), but they will enjoy essays on the Iranian Revolution (pp. 71–95)² and on the Soviet occupation of Afghanistan (pp. 114–25).³ In a generally well-documented presentation, the contributors occasionally relied too much on secondary sources and newspaper articles, which resulted in several speculative conclusions.⁴

Two chapters transcend this regionalized structure. One is also the introductory, stage-setting chapter that deals with the worsening of international relations, marked by the unequivocal end of détente. The somber message of the expiring seventies is the dominant theme of this yearbook. The second topical chapter is welcome as a recognition that international economic problems are becoming one of the overriding issues of our time (see pp. 209–35).⁵

As stated by the editors in the preface, these yearbooks are intended both as an analysis and as a comprehensive account of international events. One must admire their determination to present all this in a single, 400-page volume. However, this volume attests to the difficulties of attaining this ideal combination in the present format, in that treatment of both aspects becomes less than optimal.

These deficiencies are due primarily to the biennial approach to international affairs, which are not a static phenomenon, but a dialectic process that cannot be observed within a brief and an arbitrarily delineated time period. This process is the product of a particular international and

¹ This chapter encompasses four essays dealing with different, albeit overlapping, issues of the European Community.

² Other authors touched upon this subject, notably W. Wagner in his introductory essay to this volume. One cannot agree with his comparison of the Suez crisis with the taking of U.S. hostages in Iran, and that the Soviet Union speculated that the United States was considering an invasion of Iran (p. 7).

³ W. Wagner, *supra* note 2, pointed out that the Soviet invasion was the event that led into the second cold war period. This notion, however, is contradicted by E. Schulz, who sees the end of "relaxed" U.S.-USSR relations as early as in 1974 (p. 161).

⁴ One has been mentioned, *supra* note 3. See also the conclusion on USSR-Iraq relations, drawn from the Financial Times. See p. 110 n.28. Also, on Soviet military expenditures, see p. 175 n.39.

⁵ We could argue over the choice of topics for this chapter, which contains one essay on OPEC and another on the "New Industrialized Countries" (which has an unnecessary subchapter on West Germany and its relations with these countries). Regrettably, the editors did not include papers on the international monetary system or an analysis of growing external debts.

national political constellation and a consequence of events that, in turn, have resulted from other political developments. By the same token, any politically significant event determines and shapes future developments and must therefore be seen for what it is—a component of the political process.

C. Royen's essay on Poland exemplifies this statement. Although this volume was published in 1983, the author abruptly terminated his analysis with the final events of 1980, aware of how illusory were the gains achieved by Polish workers during that period. The situation changed drastically as early as 1981, and workers' power virtually disappeared with martial law in December 1981. Readers should have been warned of these subsequent developments or, even better, they should have been given this second half of the story in this volume.

Such rigidity causes organizational problems as well. Most contributors did their best, considering palpable spatial constraints, to inform us about the political background of the 1979–1980 events. Will the forthcoming 1980–1982 issue duplicate this effort in the follow-up essays? Poland, Western Europe, Iran, Indochina and the world economy are only a few of the many topics that will require further analysis. How deep will this cut into space required for new events?

In spite of this, the contributors did manage to cover most of the events of 1979 and 1980, although some notable issues were either completely neglected (the death of Tito in 1980) or were mentioned only marginally. Examples of the latter are President Carter's human rights policy and conflicts within the nonaligned movement.⁶

Again, the reader should identify his expectations before he reaches for this publication. One interested in detailed and thorough analysis will find this book too chronological, and should consult the bibliography (pp. 421–39) for works that concentrate on narrowly defined topics. Others, interested in a cursory knowledge of international events, will find the present coverage and analysis more than satisfactory. However, one aspect of this yearbook will have universal value. It is a useful reference book and a reminder of the volatile years of 1979 and 1980.

DAMIR NAGLER
Arlington, Virginia

Netherlands Yearbook of International Law. Vol. XIV, 1983. Published under the auspices of the T.M.C. Asser Instituut, The Hague. The Hague: Martinus Nijhoff Publishers, 1983. Pp. 527. Index. Dfl.110; \$44.

As in previous years, this useful publication contains leading articles, followed by a review of current Dutch state practice, treaties, municipal legislation involving international law, judicial decisions and scholarly literature. The articles are unusually interesting. The first, by Hugo J. Hahn of Würzburg, analyzes a 1980 arbitral award interpreting provisions

⁶ These are mentioned briefly at pp. 160 and 169, respectively.

designed to maintain the value of bonds issued in connection with the agreement negotiated by Owen D. Young in 1930 regarding reparations after the First World War (the bonds, it appears, are now chiefly owned by Germans). Béla Vitányi of Nijmegen compares the views of Grotius on treaty interpretation with those embodied in the Vienna Convention of 1969. The sociological analysis of judicial opinions, popularized by Schubert's work on the U.S. Supreme Court, is applied to the International Court of Justice by Lyndel V. Prott of Sydney. D. Kokkinou-Iatridou and P. J. M. de Waart of Amsterdam discuss multinational corporations as investors in developing countries. Two articles relate to the law of the sea. Glen Plant of Durham describes maritime "picketing" by "Greenpeace" vessels of whaling ships and nuclear waste dumpers. P. de Vries Lentsch treats the right of overflight by aircraft over "archipelagic" states composed of islands and "strait" states bordering upon straits used for international navigation between one part of the high seas or an exclusive economic zone and another such zone or part of the high seas.

Under the heading of state practice may be noted an interesting discussion recommending ratification of the European Convention of May 16, 1972 on sovereign immunity. The Convention adopts the restrictive view with respect to *acta gestionis*, which prevails in the Netherlands and the United States, as well as generally among non-Communist states (p. 251 *et seq.*). An interesting memorandum relates to the political offense exception in extradition treaties (p. 275 *et seq.*). In response to a question in Parliament, the Minister of the Interior expressed the opinion that prayer at the opening or closing of sessions of municipal bodies did not violate Dutch law or international human rights agreements, but was an acceptable manifestation of the freedom of conscience of the persons participating, "provided there is no obligation on the part of other persons to take part in the manifestation or to show active respect for it, for example, by standing up" (pp. 293-94). A Dutch court in Breda convicted the seller of anti-Semitic postcards notwithstanding a "free speech" defense, holding that such punishment "did not affect all criticism of the State of Israel, but only criticism expressed in an insulting form" (pp. 400-01). A court at The Hague held that a Dutch subsidiary of a Texas company was bound by its contract to sell equipment for use in the Russian gas pipeline notwithstanding the subsequently withdrawn Reagan embargo (pp. 417-19).

EDWARD DUMBAULD
U.S. Senior District Judge

American Foreign Policy: Basic Documents, 1977-1980. Dept. of State Pub. 9330. Washington: Department of State, 1983. Pp. 1, 1458. Index. \$27.

This is a welcome addition to the official documentation on U.S. foreign relations. Covering the 4 years of the Carter administration, it resumes the series of contemporary documents first published in 1950 as *A Decade*

of *American Foreign Policy: Basic Documents, 1941-1949* and continued as *American Foreign Policy, 1950-1955: Basic Documents* (2 vols., 1957) and as annual volumes thereafter for the years 1956-1967, when this series was discontinued. Current plans are to produce separate volumes simultaneously for the periods 1968-1972 and 1973-1976 and also annual volumes beginning with the year 1981. As a result, eventually a continuing series will be available covering the entire period beginning with 1941. These volumes parallel but do not duplicate the traditional *Foreign Relations of the United States* and other Department of State publications, which aggregate a massive reservoir of systematically designed and published resources on American diplomacy.

Illustrations of the major developments in U.S. foreign affairs during the 4 years covered by this volume range, for example, from basic functional and areal policy, collective defense, arms control, nuclear weaponry, peacekeeping, independence of emergent states and international terrorism to the establishment of full diplomatic exchanges with the People's Republic of China and attempts to normalize relations with Cuba, the invigoration and nuclearization of NATO, the disestablishment of the Southeast Asia Treaty Organization and the treatment of Indochinese "boat people" and Cuban refugees. They also include the Arab-Israeli dispute, the Iranian hostage crisis, the Iraqi-Iranian war and the Soviet invasion of Afghanistan and Vietnamese aggression in Kampuchea (Cambodia), as well as the signing of the Panama Canal Treaties, the Egyptian-Israeli Camp David Accords and the SALT II Treaty.

Many of these subjects are of concern to those interested in international law. Students of summit diplomacy may appreciate the inclusion of documents that pertain to presidential trips abroad, visits of foreign leaders to the United States and particularly President Carter's participation in 14 summit conferences and meetings—several NATO, Western four-power, Western economic and Camp David meetings, and his bilateral conclaves with Brezhnev in Vienna and Deng Xiaoping in Washington.

The 741 documents contained in this compilation constitute largely "end-product" materials, as distinguished from day-to-day diplomatic correspondence flowing between the Department of State and the White House, other Washington agencies and American diplomatic missions—which are provided in the *Foreign Relations* series and in more specialized collections. These documents are generally available in some prepublished version. Most of them constitute presidential proclamations and executive orders, addresses by the President, Secretary of State and other ranking officials, and statements made by them in such forums as press conferences, congressional committee hearings and international agencies. Others include memorandums, working papers, joint declarations and communiqués, and a few letters and reports.

Carefully designed, this volume provides both a general table of contents and a complete list of documents, and 13 substantive parts. The first two parts are devoted to general principles and objectives of foreign policy and various aspects of the conduct of foreign relations. Parts III-VII

provide documentation on functional policy—national security, arms control, including the SALT II Treaty, foreign economic policy, the United Nations and developments in international law, and human rights. The bulk of the volume—approximately 77 percent—consists of six areally oriented segments. These focus on Europe and Canada, the Middle East, South Asia, East Asia and the Pacific, Africa and Latin America. They contain subsections on such matters as NATO, the Arab-Israeli conflict and relations with nine subregions and 25 specific countries, with greatest space devoted to Afghanistan, Iran, Communist China, Panama and Vietnam.

Each document carries a descriptive title, date and indication where it was published or presented. The compilers append a helpful 33-page, double-columned index, and they also provide liberal annotations of three types: explanatory, cross-reference and source notes. The latter include citations to such collections as the *Public Papers of the Presidents* and *Weekly Compilation of Presidential Documents*, transcripts of news briefings, the Department of State *Bulletin* and other departmental publications, congressional hearings and White House, Department of State and other press releases.

This volume was produced by a team of experts in the Office of the Historian of the Department of State. Some may criticize the *Basic Documents* series for matters of inclusion, exclusion or treatment. Others may regard it as less comprehensive and probing than the *Foreign Relations* volumes because of selectivity or because it fails to provide “definitive” information. But the *Basic Documents* volumes do possess the advantages of enabling the user to probe at least the ultimate stages of “essential” contemporary documents, of organizing these in a handy, usable way, and of currency—making them readily available shortly after the years to which they pertain. For this, its compilers deserve the gratitude of statesmen, scholars and students of contemporary American diplomacy.

ELMER PLISCHKE

University of Maryland, Emeritus

Gettysburg College

American Enterprise Institute

BRIEFER NOTICES

The International Law of the Sea. Volume II. By D. P. O'Connell. Edited by I. A. Shearer. (New York: The Clarendon Press; Oxford University Press, 1984. Pp. xxvi + 567. Indexes. \$76.) This second volume of the late Professor O'Connell's treatise on the international law of the sea might have been entitled “Jurisdiction in the Law of the Sea.” Chapters 19–27, inclusive, deal with jurisdiction from the standpoint of theory (ch. 19), activities (shipping, pollution and marine scientific research, chs. 20, 25 and 26), areas (high seas, ports and contiguous zones, chs. 21, 22 and 27) and legal process (civil and criminal jurisdiction, chs. 23 and 24). This combination of perspectives enables coverage of a wide array of familiar

topics such as the nationality of ships, exercise of authority over foreign vessels on the high seas, access to ports and treatment of ships thereafter, arrest of vessels, collisions, salvage, piracy, military uses of the seabed, customs and enforcement issues.

Although all the discussion is profitable, the most useful set of chapters offers considerable technical detail about boundaries at sea and their delimitation for the territorial sea, exclusive economic zone and continental shelf (chs. 16–19). These are the best in a book that is notable for the depth of its historical scholarship, thoroughness of documentation and comprehensiveness in the range of issues examined. For research into virtually all traditional law of the sea issues, the two volumes by O'Connell are probably the best place to start.

WILLIAM T. BURKE
School of Law
University of Washington

The Mongolian Legal System: Contemporary Legislation and Documentation. By W. E. Butler. (The Hague, Boston, London: Martinus Nijhoff Publishers, 1982. Pp. xxiii, 995. Dfl.450; \$195.) In English literature on legal systems of socialist countries, the Mongolian legal system is usually ignored or mentioned by passing reference only, despite the fact that the Mongolian People's Republic was the first satellite country established by the Soviet Union in 1924. Therefore, Professor Butler's collection of the basic laws of this country provides a useful service to comparative lawyers who would like to know the basic legal structure and legislation of this little-known country.

The book begins with an outline of some aspects of the administration of justice in prerevolutionary Mongolia. This is followed by two chapters on the nature and system of current Mongolian law, legal education and legal research. These three chapters give the reader an overall view of the Mongolian legal tradition and the present legal system. Chapters IV–XIX deal with various aspects of the legal system. In addition to the text of the legislation, each chapter usually also includes excerpts from legal essays by Soviet or Mongolian writers. The remaining chapters (XX–XXII, pp. 843–963) cover legislation, decrees or excerpts of essays relating to international law, including foreign relations, legal status of foreigners, trade, diplomatic and consular law and writers' views on certain problems of public international law. International lawyers will find this part most interesting, as little is known about Mongolia's practice and views of international law.

HUNGDAH CHIU
University of Maryland School of Law

Comparative Law Yearbook. Volume 6, 1982. Edited by Dennis Campbell. Issued by The Center for International Legal Studies. (The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1983. Pp. vi, 253. Dfl.145; \$56.50.) Volume 6 is divided into two parts. Part I consists of six essays on the legal status of foreign workers in France (M. Buy), the Federal Republic of Germany (M. Quaas), Israel (A. L. Miller), Sweden (L. Hatzidaki-Dahlström), Switzerland (H. Bollmann) and the United Kingdom

(F. Weiss and F. Wooldridge). Why these are classed as a "symposium" is not evident, for there is nothing to indicate they were conceived or discussed in common, but all are instructive.

The second half of the volume, prepared by the Pacific International Law Society, surveys recent developments in private international law, defined to embrace antitrust law, commercial law, domestic relations, intellectual property and procedure. The emphasis is very much on U.S. and Western European developments, legislative and judicial, and the accent decidedly on survey rather than analysis. Part II, if retained in future volumes, will require much rethinking and reworking before it achieves the level needed to make a significant contribution to the field.

W. E. BUTLER

BOOKS RECEIVED*

International Law—General

- Chiu, Hungdah (ed.). *Chinese Yearbook of International Law and Affairs*. Vol. 3 (1983). Taipei: Chinese Society of International Law—Chinese (Taiwan) Branch of the International Law Association, 1984. Pp. 347. Indexes. \$12.
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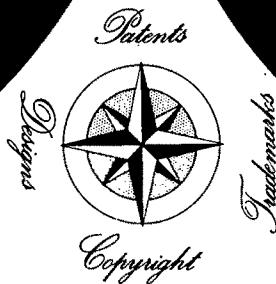


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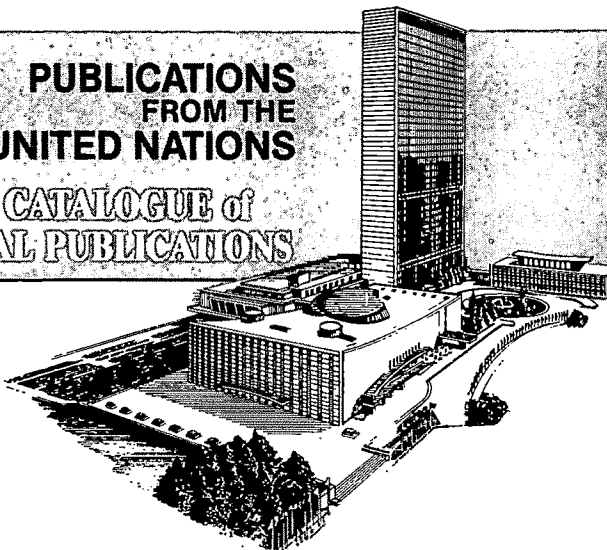
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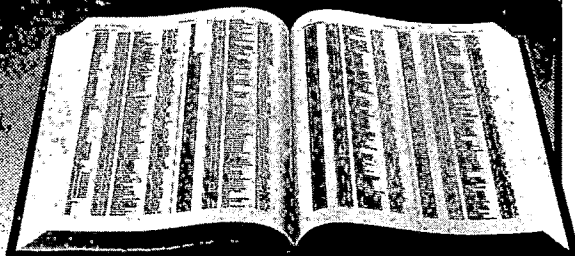
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THE ADVISORY PRACTICE OF THE INTER-AMERICAN HUMAN RIGHTS COURT

*By Thomas Buergenthal**

I. INTRODUCTION

The American Convention on Human Rights entered into force in 1978.¹ To date, 18 OAS member states, out of 31, have ratified it. Included among the states parties to the Convention are all the Central American Republics² as well as Panama, Mexico, the Dominican Republic and Haiti. The five Andean Pact nations³ have ratified, as have Jamaica, Barbados and Grenada. Argentina is the latest state to become a party; it did so on September 5, 1984, and thus became the first and, to date, only Southern Cone country to do so. The others—Chile, Paraguay and Uruguay—have not ratified; nor have Brazil, the United States, Suriname and a number of English-speaking Caribbean states.

The Convention establishes two supervisory organs, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.⁴ The Commission provided for by the Convention is a successor to the Inter-American Commission on Human Rights that came into being in 1959 as an "autonomous entity" of the Organization of American States and subsequently was transformed into an organ of the Organization.⁵ The new Commission retains the functions of its predecessor in addition to those conferred on it by the Convention. It is thus both an OAS Charter organ and a Convention institution.⁶ The Court, on the other

* Of the Board of Editors; Vice President, Inter-American Court of Human Rights.

¹ The American Convention on Human Rights [hereinafter cited as Convention] was opened for signature in San José, Costa Rica, on Nov. 22, 1969, and entered into force on July 18, 1978. For the text, see ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM [hereinafter cited as HANDBOOK], OEA/Ser.L/V/II.60, Doc. 28, at 29 (1983), 9 ILM 675 (1970). The relevant *travaux préparatoires* are reproduced in 2 T. BUERGENTHAL & R. NORRIS, HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM (1982).

² Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua.

³ Bolivia, Colombia, Ecuador, Peru and Venezuela.

⁴ The functions of these organs are described in Buergenthal, *The Inter-American System for the Protection of Human Rights*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439 (T. Meron ed. 1984), which also contains an extensive bibliography on the subject. *Id.* at 491.

⁵ The Protocol of Buenos Aires, 21 UST 607, TIAS No. 6847, which entered into force in 1970 and amended the 1948 OAS Charter, effected this change. See OAS CHARTER arts. 51(e), 112, and 150; Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AJIL 828 (1975).

⁶ See Statute of the Inter-American Commission on Human Rights [hereinafter cited as Commission Statute], Arts. 1, 18–20. For the text of the Commission Statute, see HANDBOOK,

hand, is not an OAS Charter organ as such. The Convention does, however, confer judicial powers on it in relation to both the OAS and those of its member states that are not parties to the treaty.⁷ Without expressly mentioning the Court, the OAS Charter in turn anticipates its establishment and recognizes that its powers will be determined by the Convention.⁸ The Court's authority to exercise them not only with regard to the states parties to the Convention, but also with regard to the OAS and all of its member states, was confirmed by the OAS General Assembly when it adopted the Statute of the Court.⁹

Hence, besides being a Convention organ, the Court is a judicial institution of the OAS in matters relating to human rights. As a Convention organ, it has the power to decide disputes relating to the interpretation and application of the Convention involving any states parties to it that have accepted the Court's contentious jurisdiction.¹⁰ Only these states and the Commission may refer such cases to the Court or be required to appear before it.¹¹ The decisions of the Court in these cases are final and binding for the parties to the disputes.¹²

The role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction. It may be invoked by all OAS organs and all OAS member states, whether or not they have ratified the Convention. In the exercise of this jurisdiction, the Court has the power to interpret the Convention and any other human rights treaty applicable in the Americas.¹³ Although the Court's contentious jurisdiction has been resorted to in only one case in the first 5 years of its existence, it has in that same period rendered four advisory opinions. They have enabled the Court to clarify the scope of its advisory jurisdiction and the role it performs in human rights matters within the inter-American system. These opinions are important also for the contributions they make to the development of international human rights law. The purpose of this article is to analyze the Court's advisory jurisdiction practice.

supra note 1, at 107, and 1 OAS GENERAL SECRETARIAT, THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS & OTHER DOCUMENTS [hereinafter cited as THE INTER-AMERICAN SYSTEM], pt. 2, at 98 (F. V. García-Amador ed. 1983).

⁷ See Convention, Art. 64, which deals with advisory jurisdiction.

⁸ See OAS CHARTER art. 112, which, after providing for the establishment of the Inter-American Commission on Human Rights, declares in paragraph 2 that "[a]n inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters" (emphasis added).

⁹ For the Statute of the Court, see HANDBOOK, *supra* note 1, at 147. Article 60 of the Convention provides that "[t]he Court shall draw up its Statute which it shall submit to the [OAS] General Assembly for approval." The OAS General Assembly gave that approval in October 1979 and the Statute entered into force on January 1, 1980.

¹⁰ To date, the following states have accepted the Court's jurisdiction: Argentina, Costa Rica, Ecuador, Honduras, Peru and Venezuela.

¹¹ Convention, Art. 62. See Buergethal, *The Inter-American Court of Human Rights*, 76 AJIL 231, 235-41 (1982).

¹² Convention, Arts. 67-68.

¹³ See *id.*, Art. 64.

II. ADVISORY JURISDICTION: ITS ROLE AND SCOPE

The advisory power of the Court is spelled out in Article 64 of the Convention, which reads as follows:

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Since the Court performs a different role depending upon whether it acts under Article 64(1) or 64(2), it is useful to analyze these provisions separately.*

Jurisdiction under Article 64(1)

Standing. The right to request advisory opinions from the Court under Article 64(1) is conferred on "member states of the Organization of American States" as well as, "within their spheres of competence," on "the organs listed in Chapter X" of the OAS Charter. The Convention, in its various provisions, distinguishes between "member states" of the Organization and "States Parties" to the Convention.¹⁴ It is clear, therefore, that the right of states to seek advisory opinions under Article 64(1) extends to all OAS member states, whether or not they have ratified the Convention,¹⁵ and that it is not restricted by the jurisdictional requirement applicable to OAS organs, which limits the latter to matters falling "within their spheres of competence."

In identifying the organs that have standing to request advisory opinions, the Convention refers to chapter X of the OAS Charter. Chapter X consists of one provision, Article 51. It lists the following organs: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils (the Permanent Council of the OAS, the Inter-American Economic and Social Council, and the Inter-American Council for Education, Science and Culture), the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. The Specialized Conferences are intergovernmental meetings convened by the OAS "to deal with special technical matters or to develop specific

¹⁴ See, e.g., Convention, Arts. 41(d), 43 and 62.

¹⁵ "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion No. OC-1/82 of Sept. 24, 1982 [hereinafter cited as "Other Treaties"], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 1, para. 14 (1982), reprinted in 3 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 25, at 21 (1983), and 22 ILM 51 (1983).

aspects of inter-American cooperation."¹⁶ These conferences are not permanent entities, but rather meetings that are convened from time to time. The Specialized Organizations, by contrast, are permanent institutions. They are defined in Article 130 of the OAS Charter as "inter-governmental organizations established by multilateral agreements and having specific functions with respect to technical matters of common interest to the American States." Six organizations have this status at this time: the Inter-American Commission of Women, the Pan American Health Organization, the Inter-American Children's Institute, the Pan American Institute of Geography and History, the Inter-American Indian Institute and the Inter-American Institute for Cooperation on Agriculture.¹⁷

Organs may only seek advisory opinions "within their spheres of competence." In its opinion on *The Effect of Reservations*, the Court interpreted this phrase to require a showing by the petitioning organ of a "legitimate institutional interest" in the questions posed in the request.¹⁸ The existence of this interest is to be deduced from the legal instruments and other legal norms applicable to the particular organ. "While it is initially for each organ to decide whether the request falls within its sphere of competence, the question is, ultimately, one for this Court to determine by reference to the OAS Charter and the constitutive instrument and legal practice of the particular organ."¹⁹ The requirement will not present significant problems for organs such as the OAS General Assembly and the Human Rights Commission, which have broad powers relating to the promotion and enforcement of human rights. Thus, the Court has already emphasized that because of the extensive powers that the OAS Charter, the American Convention and the Commission's Statute confer on it, the Commission, "unlike some other OAS organs, . . . enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention."²⁰ The same reasoning no doubt applies to the General Assembly, the "supreme organ" of the OAS, which has plenary powers to determine the Organization's actions and policies.²¹

Here it should be noted that the Court's advisory power applies not only to the American Convention but also to the interpretation of "other

¹⁶ OAS CHARTER art. 128.

¹⁷ For a description of these entities, see 1 THE INTER-AMERICAN SYSTEM, *supra* note 6, pt. 1, at 198-200 (1983).

¹⁸ *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Advisory Opinion No. OC-2/82 of Sept. 24, 1982 [hereinafter cited as *Effect of Reservations*], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 2, para. 14 (1982), *reprinted in* 3 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 25, at 39 (1983), and 22 ILM 37 (1983).

¹⁹ *Id.*

²⁰ *Id.*, para. 16. *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion No. OC-3/83 of Sept. 8, 1983 [hereinafter cited as *Restrictions to the Death Penalty*], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 3, para. 42 (1983), *reprinted in* 23 ILM 320 (1984).

²¹ OAS CHARTER arts. 52-58.

treaties concerning the protection of human rights in the American states.”²² Given the large number of treaties that have an impact on the work of various OAS organs, it should not prove difficult for most of them, including some of the specialized organizations, to demonstrate a “legitimate institutional interest” in an advisory opinion request that relates to their activities and involves the interpretation of one of these treaties. To date, such requests have come only from the Inter-American Human Rights Commission. But since other organs also deal with human rights matters on a more or less regular basis, in due course they, too, will no doubt begin to file requests for advisory opinions. A prime candidate might be the Inter-American Commission of Women whose activities include efforts to promote the human rights guaranteed by UN, ILO and OAS treaties of special concern to women.

Treaties Subject to Interpretation. Article 64(1) extends the Court’s advisory jurisdiction to the interpretation of the “Convention or . . . other treaties concerning the protection of human rights in the American states.” While the reference to the “Convention” needs no explanation, the same is not true of the meaning of “other treaties.” Some of the issues it raises were dealt with by the Court in its first advisory opinion.²³ In that case, the Government of Peru asked the Court to decide “how . . . the phrase ‘or of other treaties concerning the protection of human rights in the American states’ [should] be interpreted.”²⁴ Without taking a position on the meaning of the phrase, Peru suggested that it might be interpreted to refer either to treaties adopted within the framework of the inter-American system, to treaties concluded solely among American states, or to treaties that included one or more American states as parties. The Court ruled that, in principle, the provision conferred on it “the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system.”²⁵ In short, the treaty need not be one that was adopted within the inter-American system or a treaty to which only American states may be parties. It may be bilateral or multilateral, and it need not be a human rights treaty as such, provided the provisions to be interpreted relate to the protection of human rights.²⁶

This holding is probably narrower than it appears at first glance. After concluding that there was no valid reason, in principle, to distinguish between regional and international human rights treaties, the Court emphasized that its power to comply with a request to interpret these instruments was discretionary. Whether it would exercise the power depended upon various factors related to the purposes of its advisory

²² The meaning of this phrase and the subject as a whole are discussed in the pages that follow.

²³ “Other Treaties,” *supra* note 15. For a valuable analysis of this case, see Parker, “Other Treaties”: *The Inter-American Court of Human Rights Defines its Advisory Jurisdiction*, 33 AM. U.L. REV. 211 (1983).

²⁴ “Other Treaties,” *supra* note 15, para. 8.

²⁵ *Id.*, para. 21.

²⁶ *Id.*, para. 34.

jurisdiction. "This jurisdiction," the Court declared, "is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field." Consequently, "any request for an advisory opinion which has another purpose would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court."²⁷ After reviewing the considerations that had to be taken into account in making this assessment, the Court declared:

[T]he Court may decline to comply with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, *inter alia*: because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.²⁸

In its view, Article 64(1) of the Convention permits the Court to interpret any international treaties affecting the protection of human rights in an American state. This might include, for example, the human rights provisions of the United Nations Charter or of the Geneva Conventions.²⁹ But the answer to the question whether the Court will exercise its power in a specific case will depend upon the purposes for which the interpretation is sought and the consequences it might have on states or organs outside the inter-American system. If this analysis is sound, the Court can be expected to be more reluctant, for example, to comply with requests for advisory opinions seeking the interpretation of UN treaties, particularly if they have their own enforcement machinery, than it would be to interpret an OAS human rights treaty. It is equally clear, however, that in a proper case, the Court has the power and would not refuse to interpret a UN or other universal treaty—especially if it was thought that the opinion might help an American state to comply with its human rights obligations or an OAS organ to discharge its functions.

Two other questions bearing on the meaning of the phrase "other treaties concerning the protection of human rights in the American states" suggest themselves. They have not as yet been dealt with by the Court. One has to do with the definition of "human rights." It has already been noted that the reference is not only to human rights treaties as such, and that it permits the Court to interpret the human rights provisions of

²⁷ *Id.*, para. 25.

²⁸ *Id.*, para. 52.

²⁹ The four Geneva Conventions, 75 UNTS 31, 85, 135 and 287, deal with the following subjects: the Amelioration of Conditions of the Wounded and Sick in Armed Forces in the Field; the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; the Treatment of Prisoners of War; and the Protection of Civilian Persons in Time of War. The four Conventions were opened for signature on Aug. 12, 1949, and entered into force on Oct. 21, 1950.

bilateral or multilateral treaties, whether or not such treaties deal exclusively with human rights. Examples here might be the human rights provisions of an extradition treaty or of a bilateral commercial agreement. But, and this is a question that remains to be answered, what is a "human rights" provision? In dealing with this problem, the Court might look to the catalog of rights found in the principal international and regional human rights instruments and in the constitutions of the states constituting the inter-American system. The OAS Charter and the American Convention, it should be noted, refer expressly not only to civil and political rights, but also to economic, social and cultural ones.³⁰ The same is true of many international human rights instruments, which suggests the pervasive scope of the Court's advisory jurisdiction.

The second question is more difficult. It concerns the Court's jurisdiction to interpret the American Declaration of the Rights and Duties of Man. The Declaration was adopted in 1948 in the form of an inter-American conference resolution.³¹ As such, it is clearly not a "treaty" within the meaning of Article 64(1) of the American Convention. It is generally recognized, however, that the Protocol of Buenos Aires, which amended the OAS Charter, changed the legal status of the Declaration to an instrument that, at the very least, constitutes an authoritative interpretation and definition of the human rights obligations binding on OAS member states under the Charter of the Organization.³² This view is reflected in the Statute of the Inter-American Commission on Human Rights, which was adopted by the OAS General Assembly in 1979 pursuant to Article 112 of the OAS Charter and Article 39 of the American Convention.³³ Article 1 of the Statute, after declaring in paragraph 1 that the Commission is an OAS organ "created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter," reads as follows:

2. For the purposes of the present Statute, human rights are understood to be:

a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;

³⁰ OAS CHARTER art. 3 and chs. VII, VIII, and IX; Convention, Art. 26.

³¹ Res. XXX, Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30–May 2, 1948, at 38 (Pan-American Union 1948), *reprinted in* 1 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 5, at 1 (1982), and 1 THE INTER-AMERICAN SYSTEM, *supra* note 6, pt. 2, at 5.

³² For an express holding to that effect, see Inter-American Commission on Human Rights, Res. No. 23/81, Case 2141 (U.S.) of Mar. 6, 1981, IACHR, ANNUAL REPORT, 1980–1981, OEA/Ser.L/V/II.54, doc. 9, rev. 1, at 25, paras. 16–17 (1981), *reprinted in* 2 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 21, at 6, paras. 16–17 (1983). See generally Shelton, *Abortion and Right to Life in the Inter-American System: The Case of "Baby Boy,"* 2 HUM. RTS. L.J. 309 (1981); Buergenthal, *supra* note 5, at 835.

³³ Commission Statute, *supra* note 6. For the legislative history of the Statute, see Norris, *The New Statute of the Inter-American Commission on Human Rights*, 1 HUM. RTS. L.J. 379 (1980); 1 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 9 (1982).

b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

The Statute also relies on the Declaration in defining the powers of the Commission in relation to all OAS member states as well as with respect to states that have not ratified the Convention.³⁴ Since the Commission's powers with regard to the latter states are derived from the OAS Charter, it can be argued that the General Assembly, in approving the Commission's Statute and the references to the Declaration, confirmed the normative status of the Declaration as an instrument giving specific meaning to the vague human rights provisions of the Charter. If these considerations justify the conclusion that the Charter incorporates the Declaration by reference or that the Declaration constitutes an authoritative interpretation of the human rights provisions of the Charter, the Court's power under Article 64(1) to interpret the Charter would embrace the power to interpret the Declaration as well. It remains to be seen whether the Court will adopt the approach just indicated or opt for a strict textual construction, concluding that since the Declaration is not a "treaty," it does not fall within the Court's jurisdiction under Article 64(1).

A related question concerning the status of the Universal Declaration of Human Rights, which raises similar issues, might be presented to the Court in the context of a request for an advisory opinion seeking an interpretation of the human rights provisions of the UN Charter. Here it is relevant to note that the Convention makes specific reference to the American Declaration³⁵ and to the Universal Declaration of Human Rights.³⁶ The reference to the American Declaration in Article 29(d) of the Convention is particularly significant, for it declares that no provision of the Convention shall be interpreted as "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." To the extent that the Court, in applying Article 29, may be called upon to interpret the American Declaration, it has the power to do so under Article 64(1); it would merely be interpreting the Convention.

Disguised Contentious Cases. International tribunals exercising advisory and contentious jurisdiction have at times had to confront a problem that arises when they are asked to render an advisory opinion on an issue that is, at one and the same time, the subject of a dispute between two or more states or between a state and an international organization. Here the argument frequently made is that the request for an advisory opinion is a disguised contentious case and that it should be heard only if all the parties have accepted the tribunal's contentious jurisdiction. The International Court of Justice, for example, has consistently rejected such arguments and complied with the requests.³⁷ The inter-American human

³⁴ Commission Statute, *supra* note 6, Arts. 18 and 20.

³⁵ See Convention, Preamble, para. 3 and Art. 29(d).

³⁶ Convention, Preamble, paras. 3 and 4.

³⁷ See, e.g., Western Sahara, 1975 ICJ REP. 12 (Advisory Opinion of Oct. 16). The Permanent Court of International Justice reached a contrary decision in the Advisory

rights system adds a new dimension to this problem that is unique to the advisory functions of the Court. Under Article 64(1) of the Convention, the Court's advisory jurisdiction may be invoked not only by organs or organizations, as is the case in the UN system, for example, but also by states. The Court might therefore confront a petition by a state asking it to render an advisory opinion relating to a dispute between the petitioner and another state, which dispute could not be referred to the Court as a case because one of the states had not accepted its contentious jurisdiction. Moreover, the Inter-American Commission on Human Rights, which has the right to request advisory opinions, exercises powers under the Convention comparable to that of a tribunal of first instance in dealing with charges alleging violations of human rights by a state party and may also refer contentious cases to the Court.³⁸ Since the Commission may only bring such cases to the Court if the states concerned have accepted the Court's jurisdiction, the question arises whether the Commission has the power, in the absence of a state's consent, to seek an advisory opinion under Article 64(1) regarding a legal issue in dispute in a case being considered by the Commission.

To date, the Court has dealt with only one case bearing on these issues. Here the Inter-American Commission had embarked on a country study of the human rights situation in Guatemala, which was charged with numerous human rights violations.³⁹ The authority of the Commission to prepare country reports derives from its status as an OAS Charter organ and is governed by different provisions of the Convention and its Statute from those which deal with the disposition of petitions filed by individuals and communications presented by states parties charging another state party with violations of the human rights guaranteed in the Convention.⁴⁰ When the Commission prepares country studies and reports, it acts first

Opinion on Eastern Carelia, 1923 PCIJ, ser. B, No. 5, but the case has been consistently distinguished by the ICJ. See Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4*; *Questions of Jurisdiction, Competence and Procedure*, 24 BRIT. Y.B. INT'L L. 1, 140-42 (1958). See also M. POMERANCE, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N.* ERAS 277 (1973).

³⁸ See Convention, Arts. 46, 51 and 62.

³⁹ See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF GUATEMALA*, OEA/Ser.L/V/II.61, doc. 47, rev. 1 (Oct. 5, 1983).

⁴⁰ Country studies and reports are authorized by Article 41(c) of the Convention and Article 18(c), (d) and (g) of the Commission's Statute; they may be carried out by the Commission in relation to all OAS member states. The power of the Commission vis-à-vis states not parties to the Convention flows from the general grant of authority contained in Article 112 of the OAS Charter, which refers specifically to the Convention. See Buergenthal, *supra* note 4, at 475-79. The power of the Commission to decide individual petitions is contained in Article 41(f) of the Convention and applies only to states parties. See Norris, *The Individual Petition Procedure of the Inter-American System for the Protection of Human Rights*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 108 (H. Hannum ed. 1984). The power of the Commission to receive communications by one state party against another is restricted to states that have made a special declaration under Article 45 of the Convention.

and foremost as an OAS Charter organ; whereas, when it deals with petitions and communications filed under the Convention, it discharges the functions of a tribunal of first instance or Convention institution which, together with the Court, comprises the judicial and enforcement machinery provided for by the Convention.

These different functions need to be kept in mind when analyzing the Court's advisory opinion involving Guatemala.⁴¹ Here the Court was asked by the Commission to render an advisory opinion on a legal issue only. The issue was one of a number of disputed matters, both legal and factual, to arise between the Commission and the Government of Guatemala while the former was examining the human rights situation in that country. In rejecting Guatemala's claim that there was a dispute between it and the Commission and that, as a result, the Court lacked the power to hear the dispute because Guatemala had not accepted its jurisdiction, the Court emphasized that the Commission's request was designed to assist it in performing its functions under Article 112 of the OAS Charter:⁴²

The powers conferred on the Commission require it to apply the Convention or other human rights treaties. In order to discharge fully its obligations, the Commission may find it necessary or appropriate to consult the Court regarding the meaning of certain provisions whether or not at the given moment in time there exists a difference between a government and the Commission concerning an interpretation, which might justify the request for an advisory opinion. If the Commission were to be barred from seeking an advisory opinion merely because one or more governments are involved in a controversy with the Commission over the interpretation of a disputed provision, the Commission would seldom, if ever, be able to avail itself of the Court's advisory jurisdiction. Not only would this be true of the Commission, but the OAS General Assembly, for example, would be in a similar position were it to seek an advisory opinion from the Court in the course of the Assembly's consideration of a draft resolution calling on a Member State to comply with its international human rights obligations.⁴³

This language suggests that the Court treated the request for an advisory opinion in this case as it would have treated a similar request from any other OAS organ acting in the discharge of its OAS Charter functions. If the holding is limited to matters under consideration by the Commission in its role as OAS Charter organ, it permits the argument that the advisory route may not be used to circumvent the restrictions applicable to the contentious process, which is initiated by individual petition or interstate communication. There is a great deal of language in the Court's opinion, however, that suggests that the holding is much broader. Thus, for example, the Court noted that "[t]he mere fact that this provision [Article 4] may also have been invoked before the Commission in petitions and communications filed under Articles 44 and 45 of the Convention" did

⁴¹ Restrictions to the Death Penalty, *supra* note 20.

⁴² *Id.*, para. 37.

⁴³ *Id.*, para. 38.

not affect the Court's conclusion about the legitimacy of the Commission's request.⁴⁴ The Court indicated, moreover, that

the Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 [on the Court's contentious jurisdiction] and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.⁴⁵

If the advisory route is in fact seen as in all respects a "parallel system" and "alternate judicial method" to the Court's contentious jurisdiction, the Commission or any interested state would be able to resort to it in the midst of a pending contentious proceeding. Here one might hypothesize a situation in which an individual has lodged a petition with the Commission against state X, a party to the Convention, alleging that X has violated various rights guaranteed in the Convention. Let us assume further that in the course of the proceedings state X and the individual litigant disagree as to the meaning of one of the disputed provisions of the Convention. May the Commission at that stage request an advisory opinion from the Court on the meaning of the disputed provision? May state X do so? Does it matter at all whether state X has accepted the jurisdiction of the Court? Is the consent of state X necessary before the Commission may request the advisory opinion?

The Court's advisory opinion relating to Guatemala does not provide any ready answers to these questions. However, one consideration mentioned in the opinion deserves to be noted. In dealing with the question whether to comply with the Commission's request, the Court made the following observation:

The Court has already indicated that situations might arise when it would deem itself compelled to decline to comply with a request for an advisory opinion. In *Other Treaties* . . . the Court acknowledged that resort to the advisory opinion route might in certain situations interfere with the proper functioning of the system of protection spelled out in the Convention or that it might adversely affect the interests of the victim of human rights violations. . . .

. . . The instant request of the Commission does not fall within the category of advisory opinion requests that need to be rejected on those grounds because nothing in it can be deemed to interfere with the proper functioning of the system or might be deemed to have an adverse effect on the interests of a victim.⁴⁶

It may well be, therefore, that the crucial question for the Court will not be whether the advisory opinion is or is not tied to proceedings pending in the Commission. Instead, the Court might seek to ascertain what impact

⁴⁴ *Id.*, para. 41.

⁴⁵ *Id.*, para. 43.

⁴⁶ *Id.*, paras. 36 and 37.

in a particular case its decision to grant the request for an advisory opinion would have on the victim or on the Convention system.

Jurisdiction under Article 64(2)

Article 64(2) of the Convention provides that "[t]he Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments." This provision enables all OAS member states, and not only the states parties to the Convention, to ask the Court to determine whether provisions of their domestic laws conform to the obligations they assumed in the Convention or in the other human rights treaties to which Article 64(1) refers.⁴⁷ The wording of Article 64(2) suggests that the applicant state may only request an interpretation of its own laws rather than the laws of another state. But to the extent that treaties ratified by a state can also be considered to be its domestic law, the state should be able to request an advisory opinion concerning their compatibility with the Convention or other human rights treaties. One might imagine a situation, for example, in which a state is served with an extradition demand pursuant to a treaty that is alleged to be in conflict with the provisions of a human rights treaty. A request for an advisory opinion under Article 64(2) concerning that treaty would in one sense seek an opinion regarding the state's domestic law even though the extradition treaty is at one and the same time an international agreement binding on other states, where it may also have the status of domestic law.

The reference in Article 64(2) to "domestic laws" leaves open the question whether the phrase refers to laws actually in force at the time the advisory opinion is requested or whether it permits the Court also to deal with proposed or draft legislation. The Court had to consider this problem in the Advisory Opinion on *Proposed Amendments*.⁴⁸ Here the Government of Costa Rica filed a request for an advisory opinion under Article 64(2), asking the Court to determine whether certain proposals to amend the Costa Rican Constitution then under consideration by the National Assembly were compatible with the Convention.⁴⁹ Since the proposed amendments remained to be adopted, the Court had to decide whether draft legislation qualified as "domestic laws" under Article 64(2). The Court answered the question in the affirmative and ruled the request admissible.⁵⁰

⁴⁷ For an analysis of the meaning of the phrase "other treaties concerning the protection of human rights in the American states," found in Article 64(1), see pp. 5-8 *supra*.

⁴⁸ Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion No. OC-4/84 of Jan. 19, 1984 [hereinafter cited as Proposed Amendments], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 4 (1984).

⁴⁹ The proposed amendments related to Articles 14 and 15 of the Costa Rican Constitution, which govern the acquisition of Costa Rican nationality. The amendments sought to make it more difficult to acquire that country's nationality by imposing longer residency requirements and prescribing additional qualifying standards and examinations. *Id.*, para. 7.

⁵⁰ *Id.*, para. 28.

In reaching this decision, the Court noted that the purpose of its advisory function was to assist OAS member states and organs in complying with their international human rights obligations; it also enabled them to avoid the contentious legal process and the sanctions associated with it.⁵¹ This purpose would be frustrated, the Court asserted, if a state could obtain a ruling on its legislation only after the law entered into force.

[I]f the Court were to decline to hear a government's request for an advisory opinion because it concerned "proposed laws" and not laws duly promulgated and in force, this might in some cases have the consequence of forcing a government desiring the Court's opinion to violate the Convention by the formal adoption and possibly even application of the legislative measure, which steps would then be deemed to permit the appeal to the Court. Such a requirement would not "give effect" to the objectives of the Convention, for it does not advance the protection of the individual's basic human rights and freedoms.

. . . Experience indicates, moreover, that once a law has been promulgated, a very substantial amount of time is likely to elapse before it can be repealed or annulled, even when it has been determined to violate the state's international obligations.⁵²

The Government of Costa Rica, the Court emphasized, could have raised the same issues in an Article 64(1) proceeding by merely rephrasing the questions. It made little sense, therefore, to adopt a strict construction of the term "domestic laws" when the only difference between an Article 64(1) and an Article 64(2) proceeding was one of procedure.⁵³ In an Article 64(1) proceeding, notice must be given to all OAS member states and organs that the proceedings have been instituted, and they must be accorded the right to present their views.⁵⁴ No such notice need be given in the case of Article 64(2) proceedings; here "the Court enjoys broad discretion to fix, on a case by case basis, the procedures to be followed."⁵⁵

The Court's holding in this case appears to have a consequence that the opinion does not address, but which is implicit in its reasoning. It seems to permit states to seek advisory opinions on the legitimacy of reservations they would like to attach to human rights treaties whose ratification they are contemplating. This conclusion follows because a reservation that has not as yet been adopted and attached to an instrument of ratification is the conceptual analogue of draft legislation. The Court has already had occasion, moreover, to interpret Article 75 of the Convention, which deals with reservations;⁵⁶ it declared that "Article 75

⁵¹ *Id.*, para. 19.

⁵² *Id.*, paras. 26 and 27.

⁵³ *Id.*, paras. 16 and 17.

⁵⁴ Rules of Procedure of the Inter-American Court of Human Rights [hereinafter cited as Rules of Procedure], Art. 52, in HANDBOOK, *supra* note 1, at 159.

⁵⁵ Proposed Amendments, *supra* note 48, para. 17.

⁵⁶ Article 75 of the American Convention reads as follows: "This Convention shall only be subject to reservations in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969."

must be deemed to permit States to ratify or adhere to the Convention with whatever reservations they wish to make, provided only that such reservations are not 'incompatible with the object and purpose' of the Convention."⁵⁷ The Court also emphasized that "[t]he States Parties have a legitimate interest . . . in barring reservations incompatible with the object and purpose of the Convention" and that this interest may be asserted "through the adjudicatory and advisory machinery established by the Convention."⁵⁸ States contemplating reservations that might be incompatible with the object and purpose of the Convention should therefore be able to obtain a clarifying ruling on the subject by requesting an opinion from the Court.

Whether or not one agrees with the Court's conclusion that it has jurisdiction under Article 64(2) to review draft legislation as well as national laws already in force, it must be recognized that the application of the advisory function to draft legislation harbors certain risks. It has the potential of embroiling the Court in internal partisan political controversies, particularly if the decision to resort to the tribunal's advisory power is motivated by a government's desire to use the opinion to defeat or to win the adoption of the legislation. The Court dealt with this problem as follows in its Advisory Opinion on *Proposed Amendments*:

The foregoing conclusion [regarding draft legislation] is not to be understood to mean that the Court has to assume jurisdiction to deal with any and all draft laws or proposals for legislative action. It only means that the mere fact that a legislative proposal is not as yet in force does not *ipso facto* deprive the Court of jurisdiction to deal with a request for an advisory opinion relating to it. . . .

. . . In deciding whether to admit or reject advisory opinion requests relating to legislative proposals as distinguished from laws in force, the Court must carefully scrutinize the request to determine, *inter alia*, whether its purpose is to assist the requesting state to better comply with its international human rights obligations. To this end, the Court will have to exercise great care to ensure that its advisory jurisdiction in such instances is not resorted to in order to affect the outcome of the domestic legislative process for narrow partisan political ends. The Court, in other words, must avoid becoming embroiled in domestic political squabbles, which could affect the role which the Convention assigns to it.⁵⁹

The Court's language suggests that it will scrutinize with particular care the reasons for and implications of a request under Article 64(2) that deals with draft legislation as distinguished from laws already in force. Here it is worth noting that in *Proposed Amendments*, the Costa Rican Government asked for the advisory opinion only after receiving a unanimous request from a multiparty committee of the Costa Rican legislature to which the draft legislation had been assigned. In other words, this was

⁵⁷ Effect of Reservations, *supra* note 18, para. 22.

⁵⁸ *Id.*, para. 38.

⁵⁹ Proposed Amendments, *supra* note 48, paras. 29 and 30.

a case in which there was internal political consensus that an advisory opinion be sought. It remains to be seen how the Court will act in a case in which there is no such consensus.

Selected Procedural Issues

Amicus Briefs and Related Issues. Each of the requests for an advisory opinion filed to date under Article 64(1) has produced amicus curiae briefs from nongovernmental human rights organizations. The Convention, the Statute of the Court and its Rules of Procedure are silent on the issue of amicus briefs, mentioning them neither in connection with contentious cases nor in connection with advisory proceedings. Article 34(1) of the Rules of Procedure does contain some language, however, that has a bearing on the subject. It reads as follows: "The Court may, at the request of a party or the delegates of the Commission, or *proprio motu*, decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function." Although this provision applies to contentious proceedings, it can also be applied to advisory proceedings.⁶⁰ Since the provision authorizes the Court *motu proprio* to hear persons whose statements might assist it in carrying out its function, it can also be argued that it permits the receipt of amicus briefs. The Court has not expressly addressed this issue. But, without commenting on their admissibility, it has formally noted the receipt of these briefs in each of the opinions rendered under Article 64(1).⁶¹ Implicit in this action is the holding that such briefs are admissible. It should be noted, however, that the admissibility of these briefs was not challenged in any of these proceedings. Such challenges are more likely to be made by the states parties to contentious cases, where private individuals and organizations may try to compensate for their lack of formal standing before the Court by filing amicus briefs. How the Court will deal with these briefs remains to be seen;⁶² no amicus brief has thus far been

⁶⁰ See Article 53 of the Court's Rules of Procedure, *supra* note 54, which provides that "[w]hen the circumstances require, the Court may apply any of the rules governing contentious proceedings to advisory proceedings."

⁶¹ See "Other Treaties," *supra* note 15, para. 5; Effect of Reservations, *supra* note 18, para. 5; Restrictions to the Death Penalty, *supra* note 20, para. 5.

⁶² The European Court of Human Rights, by amendment of its Rules of Court, adopted on Nov. 24, 1982, has now established a procedure enabling individuals and states not parties to the proceedings to request permission to file "written comments" in contentious cases. European Court of Human Rights, Revised Rules of Court, Rule 37(2), Council of Europe, Cour (82) 107 (Dec. 2, 1982). The Revised Rules of Court entered into force on Jan. 1, 1983. This important step by the European Court may well influence the decision of the Inter-American Court on this subject. It should be noted, moreover, that the European Court now also permits individuals that instituted proceedings before the European Commission of Human Rights to participate in the proceedings before the European Court, even though they lack standing to take these cases to the tribunal. *Id.*, Rule 33(1)(d) and 33(3)(d); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 213 UNTS 221, Art. 48. See also L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1118-48 (1973).

submitted in a contentious case and none was filed in the one Article 64(2) proceeding decided by the Court.

Also, the Court has not as yet had to rule on a formal request by a nongovernmental organization or individual for permission to make an oral presentation in an Article 64(1) proceeding. It is not clear whether or under what circumstances the Court would grant such a request. Article 34(1) of its Rules of Procedure appears to empower the Court to do so in cases where this would assist the tribunal "in carrying out its functions." A related question arose in an Article 64(2) proceeding.⁶³ Here Costa Rica asked the Court to review the compatibility with the Convention of certain proposed amendments to its Constitution. The Government of Costa Rica opposed the amendments, but the draft legislation had the support of various Costa Rican legislators who convinced the Government to request the advisory opinion under Article 64(2). Had this been an Article 64(1) proceeding, the Court would have been required under its Rules of Procedure to transmit copies of the Costa Rican request to all OAS member states and organs, to invite them to present their written observations, and to fix the format of the oral proceedings.⁶⁴ No comparable requirements are included in the Rules of Procedure for Article 64(2) proceedings, presumably because it was assumed that other states and OAS organs would have little interest in the domestic law issues arising in such proceedings. Leaving aside questions about the soundness of this assumption⁶⁵ and recognizing that the Court has the authority to give the requisite notice to the OAS member states and organs whenever this appears appropriate,⁶⁶ no such notice was given in *Proposed Amendments* and none was requested. But because the legislative and executive branches of Costa Rica held different views on the issues raised in the proceedings, as did various other public and private entities in the country, the Court decided on its own motion to invite interested groups to submit their views and to be heard by the Court.

Five representatives, selected by the Court in consultation with the Government of Costa Rica, were subsequently heard in the only public session held in the case. These representatives, in addition to the Minister of Justice, who was the Costa Rican Agent, were the President of the Supreme Electoral Tribunal, a member of the Legislative Assembly, the Director of the Civil Registry Office and a member of the University of Costa Rica Law Faculty. The first two representatives opposed the constitutional amendment; the remaining three strongly supported it. Apparently,

⁶³ *Proposed Amendments*, *supra* note 48, para. 17.

⁶⁴ Rules of Procedure, *supra* note 54, Art. 52.

⁶⁵ The assumption that Article 64(2) proceedings are basically "domestic" and therefore of no interest beyond the borders of the applicant state overlooks the fact that the Court's task here is to interpret the Convention or other human rights treaties; it is not its function in Article 64(2) proceedings to interpret domestic law. Other states and OAS organs may therefore have as much of an interest in Article 64(2) proceedings as in those filed under paragraph 1, and they should routinely receive the requisite notice in both instances.

⁶⁶ *Proposed Amendments*, *supra* note 48, para. 17.

no other individuals asked to be heard and no one attempted to file additional papers.

The approach that was adopted in this case appeared to be well suited to Article 64(2) proceedings because it enabled the Court to hear divergent views about the legality of the proposed amendment and about its domestic legal impact. The procedure is likely to be followed in the future, although it remains to be seen how the Court will deal with a case in which a government opposes granting a hearing to a private group or individual. In the Costa Rican case, the Government did not object to any of the representatives who wanted to be heard. This will not always be true. The Costa Rican case is not the strongest precedent, therefore, for according private groups or individuals an opportunity to be heard in advisory proceedings, particularly when their views differ from those of the government.

Jurisdictional Challenges. An interesting procedural issue was presented to the Court in the Advisory Opinion on *Restrictions to the Death Penalty*.⁶⁷ This request was filed by the Commission, which sought an interpretation of Article 4 of the Convention and a Guatemalan reservation to it. Guatemala challenged the Court's right to hear the matter, contending that the request was a disguised contentious case brought against Guatemala, which had not accepted the tribunal's contentious jurisdiction. Guatemala asked the Court to render a preliminary ruling on the jurisdictional issue before considering the merits. The Court rejected this motion and upheld the decision of its President to join the jurisdictional objections to the merits of the request.⁶⁸

The holding draws a sharp distinction between contentious cases and advisory proceedings, and notes that in the former, "the Court's jurisdiction ordinarily depends upon a preliminary and basic question, involving the State's acceptance of or consent to such jurisdiction." In the Court's view, it made no sense in a contentious case "to examine the merits of the case without first establishing whether the parties involved have accepted the Court's jurisdiction."⁶⁹ The same was not true in advisory proceedings. Here the Court's jurisdiction depends on "the identity and legal capacity of the entities having standing to seek the opinion, that is, OAS Member States and OAS organs acting 'within their spheres of competence.'"⁷⁰ Where those prerequisites are present and readily apparent on the face of the pleadings, no good reason exists to separate the jurisdictional objections from the merits. "The delay that would result, moreover, from the preliminary examination of jurisdictional objections in advisory proceedings would seriously impair the purpose and utility of the advisory power that Article 64 confers on the Court."⁷¹ Moreover, the Court emphasized, contentious cases and advisory opinions differed significantly in their effect on the rights and interests of states. In advisory proceedings, unlike in contentious cases,

⁶⁷ *Restrictions to the Death Penalty*, *supra* note 20.

⁶⁸ *Id.*, para. 29.

⁷⁰ *Id.*, para. 23.

⁶⁹ *Id.*, para. 21.

⁷¹ *Id.*, para. 25.

[t]here are no parties in the sense that there are no complainants and respondents; no State is required to defend itself against formal charges, for the proceeding does not contemplate formal charges; no judicial sanctions are envisaged and none can be decreed. All the proceeding is designed to do is to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American states.⁷²

In contentious proceedings, by contrast, the consenting states become formal parties and are under a legal obligation to comply with the Court's judgments. That was not true of advisory proceedings, although it could not be denied that "a State's interest might be affected in one way or another by an interpretation rendered in an advisory opinion." It was clear, however, that "[t]he legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected . . . by the opportunity accorded it under the Rules of Procedure of the Court to participate fully in those proceedings. . . ."⁷³

The importance the Court attaches to an expeditious advisory process is prompted by the conviction that the states and organs must be enabled to obtain relatively speedy judicial interpretations without lengthy procedural wrangles. This approach is consistent with the broad advisory powers the Convention confers on the Court and has the potential of making the advisory process a useful tool for the implementation of the international human rights obligations applicable in the Americas.

III. SOME EMERGING CONCEPTS

Advisory opinions appear to lend themselves more readily than contentious cases to the articulation of general legal principles. The contentious process, being more fact specific, will usually require a greater accumulation of decisional law to clarify or establish basic doctrines. This may explain why, in a relatively short period of time and by means of a few advisory opinions, the Court has been able to make important contributions to the conceptual evolution of the international law of human rights.

Before analyzing some of these contributions, it may be useful to look at the Court's approach to interpretation in general. The Court's starting point in interpreting the Convention has been the Vienna Convention on the Law of Treaties. In its first advisory opinion, for example, the Court declared that "in interpreting Article 64, [it] will resort to traditional international law methods, relying both on general and supplementary rules of interpretation, which find expression in Articles 31 and 32 of the Vienna Convention on the Law of Treaties."⁷⁴ It reaffirmed this proposition in subsequent opinions, stating that it "will apply the rules of interpretation set out in the Vienna Convention, which may be deemed to state the relevant international law principles applicable to this subject."⁷⁵

⁷² *Id.*, para. 22.

⁷³ *Id.*, para. 24.

⁷⁴ "Other Treaties," *supra* note 15, para. 33.

⁷⁵ Restrictions to the Death Penalty, *supra* note 20, para. 48; Proposed Amendments, *supra* note 48, para. 21.

The methodology of the Court is reflected in a recent advisory opinion, where it had to determine whether the phrase "domestic laws" in Article 64(2) of the Convention applied only to laws in force or also included proposed legislation. Invoking Article 31(1) of the Vienna Convention, the Court noted that the provision required it to "interpret the Convention 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'" Although the reference to "domestic laws," standing alone, might be understood to mean laws in force, the Court emphasized that "the 'ordinary meaning' of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty."⁷⁶ In weighing the factors bearing on the meaning of "domestic laws," the Court pointed out that if the phrase were interpreted to prevent states from obtaining advisory opinions on draft laws, some governments would be forced to promulgate laws that might violate the Convention before they could submit them to judicial review. "Such a requirement would not 'give effect' to the objectives of the Convention, for it does not advance the protection of the individual's basic human rights and freedoms."⁷⁷

On the subject of the object and purpose of the Convention, the Court observed:

The Convention has a purpose—the international protection of the basic rights of human beings—and to achieve this end it establishes a system that sets out the limits and conditions by which the States Parties have consented to respond on the international plane to charges of violations of human rights. This Court, consequently, has the responsibility to guarantee the international protection established by the Convention within the integrity of the system agreed upon by the States. This conclusion, in turn, requires *that the Convention be interpreted in favor of the individual*, who is the object of international protection, as long as such an interpretation does not result in a modification of the system [emphasis added].⁷⁸

This "favorable to the individual" interpretation is consistent with the Court's analysis of the nature of the Convention as "a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction."⁷⁹ It is also in line with Article 29 of the Convention, the provision that deals with "Restrictions Regarding Interpretation." It provides, *inter alia*, that "[n]o provision of this Convention shall be interpreted as: . . . c. precluding other rights or guarantees that are

⁷⁶ Proposed Amendments, *supra* note 48, paras. 21 and 22.

⁷⁷ *Id.*, para. 26.

⁷⁸ Government of Costa Rica (In the Matter of Viviana Gallardo, *et al.*), Decision of Nov. 13, 1981, Inter-American Court of Human Rights, No. G 101/81, para. 16 (1981), *reprinted* in 3 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 25, at 7 (1983), and 20 ILM 1424 (1981).

⁷⁹ Effect of Reservations, *supra* note 18, para. 33.

inherent in the human personality. . . ." This approach to the interpretation of the Convention explains the Court's holding that Article 64(1), in conferring on it advisory jurisdiction to interpret "other treaties concerning the protection of human rights in the American states," cannot be deemed a priori to impose geographic or regional limits. The limits must be sought elsewhere in the "purposes of the Convention" and in the fact that the Court's advisory jurisdiction "is intended to assist the American States in fulfilling their international human rights obligations."⁸⁰ Viewed in this light, it is reasonable to interpret Article 64 as conferring on "the Court . . . the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system."⁸¹ The protection of the individual thus becomes the critical or determinative element in fixing the Court's jurisdiction, provided always that the result does not distort or weaken the system established by the Convention.

The Special Character of Human Rights Treaties

The emergence of international human rights law as a branch of public international law and the acceptance of the notion that individuals have rights enforceable on the international plane without the intervention of their state of nationality have played havoc with certain basic international law principles and assumptions. A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.

The Court encountered an interesting example of this problem in its Advisory Opinion on *The Effect of Reservations*.⁸² Here the Inter-American Commission on Human Rights sought a ruling regarding the date on which the Convention entered into force for a state that ratified it with a reservation. Two provisions of the Convention have some bearing on this issue. Article 75 declares that "[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969." Article 74(2), which deals with ratification and adherence, provides that the Convention shall enter into force as soon as it has been ratified by eleven states and that "[w]ith respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence." If this latter provision is deemed to apply to ratifications whether or not they contain reservations, then the Convention would enter into force for the ratifying state on the date of the deposit of its instrument of ratification. But if ratifications containing reservations are not governed by Article 74(2), then the effect of a reservation will have to be determined by reference to Article 75, which in turn gives rise to some conceptual problems.

⁸⁰ "Other Treaties," *supra* note 15, para. 25.

⁸¹ *Id.*, para. 21.

⁸² *Effect of Reservations*, *supra* note 18.

The Commission asked for the advisory opinion because the OAS Legal Counsel determined that two states, which had ratified the Convention with reservations,⁸³ could not be deemed to have become parties to it on the date of the deposit of their ratifications; for them the effective date of entry into force was governed by Article 75, viz., the Vienna Convention on the Law of Treaties. According to the Legal Counsel, the relevant provisions of the Vienna Convention were Article 20(4) and 20(5). Under these provisions, a ratification containing a reservation, to be effective, had to be accepted by at least one other contracting party.⁸⁴ Moreover, the "reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."⁸⁵ This interpretation, if valid, would postpone by at least 1 year the entry into force of the Convention for a state that ratifies it with a reservation, and thus would deny individuals the protection of the treaty as against a state that wished to be bound by it.⁸⁶

The views of the Legal Counsel made very good sense when applied to a traditional international agreement in which the states parties granted each other rights and assumed state-to-state obligations of a reciprocal character. If a state attached a reservation to such a treaty, it was not unreasonable to give every other state party the option to accept or reject the reservation, to enter or not to enter into a treaty relationship with the reserving state, to agree or not to agree to a modification of a specific treaty obligation *pro tanto* the reservation that acceptance of the reservation implied.

Serious conceptual problems arise, however, when one attempts to apply these traditional rules to human rights treaties. What does reciprocity

⁸³ The two states in question were Barbados and Mexico. Mexico ratified with a reservation to Article 23(2) of the Convention, which deals with the right to participate in government. The Mexican reservation declared some rights guaranteed by that provision inapplicable to ministers of all religious denominations to the extent that they were barred, under Article 130 of the Mexican Constitution, from participation in certain political activities. HANDBOOK, *supra* note 1, at 95, 96. Barbados made three reservations. The first applied to Article 4(4) of the Convention, which prohibits capital punishment for "political offenses or related common crimes," and reserved the right of Barbados to apply the death penalty to treason. Its second reservation related to Article 4(5) of the Convention, which prohibits the execution of individuals who were under 18 years of age or over 70 at the time they committed the crime punishable by death. Barbados made this reservation, noting that its laws permit the execution of individuals who are over 16 and over 70. The third Barbadian reservation applied to Article 8(2)(e), which guarantees an "inalienable right" to counsel. Barbados declared that its laws do not ensure such a right. HANDBOOK, *supra*, at 69-70.

⁸⁴ Vienna Convention on the Law of Treaties, Art. 20(4), UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

⁸⁵ *Id.*, Art. 20(5).

⁸⁶ For the various arguments that were made in the case, see Inter-American Court of Human Rights, ser. B: Pleadings, Oral Arguments and Documents (The Effect of Reservations on the Entry into Force of the Convention on Human Rights (Arts. 74 and 75)), No. 2 (1983).

mean in this context? Does it mean, for example, that if state *X* makes a reservation to a due process provision of the treaty, a national of state *X*, who was denied due process by state *Y*, may not invoke that treaty clause against state *Y* because the latter's acceptance of state *X*'s reservation has modified the treaty as between them, and consequently for their national, to the extent of the reservation? To ask the question is to recognize that it is founded in a concept that is basic to traditional international law: that the rights of the individual under international law derive from and are dependent on the rights of the state of his nationality. It is equally obvious, of course, that this concept conflicts with international human rights law and modern human rights treaties whose principal objective is the protection of the individual against his own state. The Court articulated this conclusion as follows in its Advisory Opinion on *The Effect of Reservations*:

[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction. . . .

. . . Viewed in this light and considering that the Convention was designed to protect the basic rights of individual human beings irrespective of their nationality, against States of their own nationality or any other State Party, the Convention must be seen for what in reality it is: a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.⁸⁷

If a human rights treaty can in fact be characterized as being basically little more than an instrument that enables states "to make binding *unilateral* commitments not to violate the human rights of individuals within their jurisdiction," then the concept of reciprocity, a critical aspect of bilateral and multilateral government-to-government treaty making, loses much of its relevance for the application and interpretation of human rights instruments. This analysis led the Court to declare that "it would be manifestly unreasonable to conclude that the reference in Article 75 to the Vienna Convention compels the application of the legal regime established by Article 20(4), which makes the entry into force of a

⁸⁷ *Effect of Reservations*, *supra* note 18, paras. 29 and 33. The European Commission of Human Rights had earlier intimated a similar view, Application No. 788/60 (*Aus. v. Italy*), 4 EUR. Y.B. HUM. RTS. 116, 140 (1960), as did the International Court of Justice in its Advisory Opinion on Reservations to the Convention on Genocide, 1951 ICJ REP. 15 (Advisory Opinion of May 28); but no international tribunal has thus far articulated this principle as clearly as the Inter-American Court.

ratification with a reservation dependent upon its acceptance by another State.”⁸⁸ Accordingly, the reference in Article 75 to the Vienna Convention had to be interpreted “as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty.”⁸⁹ Under the Vienna Convention, a reservation made in accordance with a treaty expressly authorizing reservations does not have to be accepted.⁹⁰ The Court’s interpretation permitted it to apply the provisions of Article 74 and to hold that the Convention must be deemed to enter into force for states ratifying or acceding to it, with or without a reservation, on the date they deposit their instruments of ratification or adherence. The protection of the Convention consequently extends to all individuals within the jurisdiction of a state as soon as it has indicated its adherence.⁹¹ This result is consistent with the character of modern human rights instruments.⁹²

Nonderogability and Incompatibility

As we have seen, the Court has interpreted Article 75 to mean that all states eligible to ratify or adhere to the Convention, that is, all OAS member states,⁹³ may do so with reservations, provided these are not incompatible with the object and purpose of the treaty.⁹⁴ We also have some pronouncements by the Court to indicate which reservations might not pass the incompatibility test or, put another way, which reservations fall into a suspect category.

In the Advisory Opinion on *Restrictions to the Death Penalty*, the Court was asked to interpret Article 4 of the Convention, which deals with the right to life, and to pass on the scope of a reservation that Guatemala made to one clause of the provision. Before interpreting the reservation, the Court emphasized that it had to determine whether the reservation

⁸⁸ Effect of Reservations, *supra* note 18, para. 34.

⁸⁹ *Id.*, para. 35.

⁹⁰ Vienna Convention on the Law of Treaties, *supra* note 84, Art. 20(1).

⁹¹ See, on this subject, the resolution of the Inter-American Juridical Committee, adopted on Aug. 15, 1984, entitled Guidelines that the Depositor of a Convention Must Follow within the Inter-American System, in respect of Matters Not Clearly Regulated, OEA/Ser.G, CP/doc. 1492/84 (Sept. 10, 1984). This resolution, which applies to treaties in general and makes no mention of human rights treaties, rejects the 1-year waiting period altogether and calls for consultation prior to the deposit of instruments of ratification with reservations consistent with earlier OAS practice. On the latter subject, see 1 THE INTER-AMERICAN SYSTEM, *supra* note 6, pt. 1, at 335. Given the Court’s opinion, this recommendation should not be applied to human rights treaties.

⁹² It is important to note, in this connection, that when Argentina on Sept. 5, 1984 deposited an instrument of ratification of the Convention containing a reservation, the OAS Secretary General, on the advice of the new Legal Adviser, Dr. Hugo Caminos, decided that Argentina had become a party to the Convention on that date. Consistent with the Court’s advisory opinion, the fact that the ratification contained a reservation was not deemed to require delaying the entry into force of the Convention for Argentina.

⁹³ Convention, Art. 74(1).

⁹⁴ Effect of Reservations, *supra* note 18, para. 35.

was permitted.⁹⁵ The Court raised this issue because Article 4 of the Convention is among the provisions specifically listed in Article 27. That article permits the states parties, "[i]n time of war, public danger, or other emergency that threatens [their] independence or security," to suspend the application of the rights guaranteed in the Convention.⁹⁶ Article 27 also provides, however, that certain rights, among them those proclaimed in Article 4, may not be suspended even in emergency situations. The principal international human rights treaties have similar nonderogation clauses.⁹⁷ The same catalog of rights from which no derogation is permitted also appears, with some exceptions and variations, in these treaties.⁹⁸ There seems to be an almost universal consensus about rights that are considered the most fundamental and these, in general, are the rights from which no derogation is permitted. It is therefore extremely important to know whether states, by means of a reservation, may avoid assuming the obligation to guarantee the most basic rights. The Court dealt with this issue in the following manner:

Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.⁹⁹

This holding indicates that a reservation that sought to exclude totally the application of a right whose suspension is not permitted even in time of a serious national emergency would be incompatible with the object

⁹⁵ Restrictions to the Death Penalty, *supra* note 20, para. 61.

⁹⁶ On Article 27 in general, see Buergenthal, *The Inter-American System for the Protection of Human Rights*, 1981 ANUARIO JURÍDICO INTERAMERICANO 80 (1982).

⁹⁷ See, e.g., International Covenant on Civil and Political Rights, Annex to GA Res. 2200 (1966), Art. 4; European Convention on Human Rights, *supra* note 62, Art. 15; American Convention on Human Rights, Art. 27. See also Buergenthal, *International and Regional Human Rights Law and Institutions: Some Examples of their Interaction*, 12 TEX. INT'L L.J. 321, 324-25 (1977).

⁹⁸ See Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS 72, 78-86 (L. Henkin ed. 1981); Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1 (1981); Higgins, *Derogation under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1975-76).

⁹⁹ Restrictions to the Death Penalty, *supra* note 20, para. 61.

and purpose of the treaty. States would appear to be free, however, to make reservations to rights from which no derogation is permitted, provided the reservations do not weaken the right as a whole to a very substantial extent. The Guatemalan reservation found by the Court to be not incompatible with the object and purpose of the Convention dealt with Article 4(4), which provides that "in no case shall capital punishment be inflicted for political offenses or related common crimes." The reservation sought to preserve for Guatemala the right to apply the death penalty in cases involving "related common crimes" but left unaffected the remaining and much more basic provisions of Article 4.

The test devised by the Court was easy to apply in this case; this will not always be so. More important in the long run, however, is the fact that the opinion constitutes the first unambiguous international judicial articulation of a principle basic to the application of human rights treaties, that nonderogability and incompatibility are linked. The nexus between nonderogability and incompatibility derives from and adds force to the conceptual interrelationship which exists between certain fundamental human rights and emerging *jus cogens* norms.¹⁰⁰

IV. CONCLUSION

This study of the advisory jurisdiction of the Inter-American Court of Human Rights and of the manner in which the Court has exercised it cannot, of necessity, yield more than some tentative conclusions. The Court, after all, has been in existence only since 1979. In that time, it has had an opportunity to render no more than four advisory opinions and to decide one contentious case. The result can hardly be called a substantial body of law, although by international standards, sad to say, the number of opinions is quite respectable. More important, however, is the fact that the requests for advisory opinions submitted to the Court have enabled it to define the scope of its advisory jurisdiction to a significant extent and to give judicial expression to certain principles that are basic to the development of the international law of human rights.

In delineating the scope of its advisory jurisdiction and specifying the rules applicable to it, the Court has sought to avoid burdening the advisory process with formalistic and time-consuming obstacles. Instead, its practice reflects the view that, to be useful and effective, the advisory process has to be expeditious and capable of providing OAS organs and member states with legally sound judicial rulings conceived in an atmosphere that inspires trust in the deliberative and interpretative processes. The Court has interpreted its advisory jurisdiction broadly, while reserving the right to restrict its scope to safeguard the rights of individuals and to maintain the integrity of the protective systems established by the Convention.

¹⁰⁰ See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §339, particularly comment a (Tentative Draft No. 1, 1980); Lillich, *Civil Rights*, in Meron (ed.), *supra* note 4, at 115, 119–20; Domb, *Jus Cogens and Human Rights*, 6 ISR. Y.B. HUM. RTS. 104 (1976). See generally Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AJIL 946 (1967).

Whether the scope of the Court's advisory jurisdiction will expand further or begin to contract is closely related to the perceived needs of the inter-American system for the protection of human rights. To date, only 6¹⁰¹ out of 18 states parties to the Convention have accepted the contentious jurisdiction of the Court.¹⁰² If more states do and if the Commission and the states parties begin to submit contentious cases to the Court, resort to its advisory jurisdiction may decline and its importance diminish. For the time being, however, that is not likely to happen. It should be kept in mind, in this connection, that the effectiveness of an advisory process such as the one provided for by the Convention depends to some extent—whether to a greater or lesser extent is difficult to say—upon a working contentious judicial system that can be invoked to give teeth to the advisory process. On the other hand, the advisory process has the advantage, and this is particularly so in the human rights context, of making it politically easier for a government to comply with advisory opinions: by their very nature, they do not stigmatize the state as a lawbreaker and permit a delinquent government to make its compliance appear to be a voluntary act.

The advisory opinions that it has thus far rendered have given the Court, as we have seen, an opportunity to address some of the doctrinal problems that result from the emergence of international human rights law as a branch of public international law. The basic premise of the international law of human rights—the individual as the direct subject of rights—is not all that easily accommodated within a system of law geared to interstate relations and based on the concept of the state as exclusive subject of rights and obligations. Assumptions about treaty interpretation, about the prerogatives of states parties to international agreements, about the functions of international judicial institutions and many others require conceptual rethinking and doctrinal adjustments when the context is the international protection of human rights rather than traditional interna-

¹⁰¹ The following states have accepted the jurisdiction of the Court: Argentina, Costa Rica, Ecuador, Honduras, Peru and Venezuela.

¹⁰² The contentious jurisdiction of the Court is governed by the provisions of Article 62 of the Convention, which reads as follows:

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

tional legal relations among states. We have touched on only some of these problems in this article, limiting our analysis to the practice of the Inter-American Court of Human Rights. As a result, we have merely scratched the surface of the conceptual difficulties that exist and that are likely to arise in the future in this field. The Court's opinions also indicate that, notwithstanding the historical baggage encumbering traditional international law, international tribunals can contribute to the restructuring and revitalization of a legal system whose relevance today depends in large measure on its ability to protect the individual from massive abuse by governmental authorities.

“A SPRINGBOARD FOR THE FUTURE”: A HISTORICAL EXAMINATION OF BRITAIN’S ROLE IN SHAPING THE OPTIONAL CLAUSE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

*By Lorna Lloyd**

The Permanent Court of International Justice (PCIJ) was established in 1922. Article 36, paragraph 2 of its Statute reads:

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature and extent of the reparation to be made for the breach of an international obligation.¹

States that wished to take advantage of the opportunity offered by this paragraph did so by signing a separate Protocol, which ran as follows: “The undersigned, being duly authorised thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions.”²

This Protocol was headed by the phrase “*Optional Clause*.” In this way, Article 36, paragraph 2 itself came to be known as the Optional Clause. It was an appropriate terminology in that it gave states the *option* of accepting the compulsory jurisdiction of the Court, whether or not they attached reservations to it. This last possibility was envisaged by the third paragraph of Article 36, which stated: “The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.”

The Optional Clause—as Article 36, paragraph 2 of the Court’s Statute will hereinafter be called—was introduced into the Statute of the Permanent

* Lecturer in International Relations, University of Keele, England.

¹ Statute of the Permanent Court of International Justice, in 1 League of Nations, Minutes of the Council [hereinafter cited as Minutes of the Council], Sess. 11, Ann. 138a, at 137 (1920).

² Optional Clause, *id.*

Court at the first (1920) Assembly of the League of Nations. It was the result of a disagreement between the great powers (Britain, France, Italy and Japan), which refused to accept an international court possessing compulsory jurisdiction, and nearly all the small powers, which demanded compulsory jurisdiction. It emerged in the following manner.

I. THE FORMATIVE PERIOD

The Committee of Jurists, June–July 1920

The Covenant of the League of Nations, which entered into force at the beginning of 1920,³ provided for four principal organs. Firstly, the Secretariat serviced the League under its first Secretary-General, Sir Eric Drummond.

Secondly, the Assembly was composed of representatives of all the members of the League. It could discuss "any matter within the sphere of the League or affecting the peace of the world." Its decisions, which required unanimity to enter into force,⁴ were determined on the basis of one vote per League member. It was to be "the general directing body of the League."⁵

The third principal organ was the League Council which, according to the Covenant, was to contain five permanent members (the victorious great powers: the British Empire, the United States of America, France, Italy and Japan) and four nonpermanent members periodically elected by the Assembly.⁶ The defection of the United States left it with four permanent members until Germany was made a permanent member in 1926. As with the Assembly, each state had one vote on the Council and its decisions required unanimity.⁷ The Council was, in effect, the executive

³ On Jan. 10, 1920, when the Treaty of Versailles entered into force.

⁴ Apart from procedural matters, including the appointment of committees to investigate particular matters when a majority vote was required. A majority vote of the Assembly and the concurrence of the Council were required for a report on a dispute under Article 15 of the Covenant to have the same force as a unanimous report by the Council; for an increase in the nonpermanent membership of the League Council; for the admission of new League members that would have permanent seats on the Council; and for the appointment of the Secretary-General (other than Drummond). A two-thirds majority was required for the admission of new members and for fixing the rules dealing with the election of nonpermanent members of the Council. Amendments to the Covenant entered into force when ratified by the members of the Council and two-thirds of the members of the Assembly.

⁵ LEAGUE OF NATIONS SECRETARIAT, *TEN YEARS OF WORLD CO-OPERATION* 11 (1930). See also *id.* at 11–12 and Arts. 3, 5, 19 and 26 of the Covenant.

⁶ The number of nonpermanent members was increased to six in 1922 and nine in 1926. The latter increase was accompanied by a change in the rules to allow for the reelection of nonpermanent members, which created a category known as "semi-permanent members." See Carlton, *The League Council Crisis of 1926*, 11 *HIST. J.* 354 *et seq.* (1968).

⁷ Except on procedural issues, including the appointment of committees to investigate particular matters. Under Article 15 of the Covenant, the vote of a party to a dispute could not detract from an otherwise unanimous report. The Council could issue a majority report on a dispute, but this did not deprive members of "the right to take such actions as they shall consider necessary for the maintenance of right and justice."

of the League and represented the institutionalization of the 19th-century Concert of Europe on a global scale. Apart from its primary role in the settlement of disputes, the Covenant assigned it specific responsibilities. One of these responsibilities was the formulation of plans for an international court of justice, which were then to be presented to the Assembly.⁸

This Permanent Court of International Justice was to be the fourth principal organ of the League and the Council treated its establishment as an urgent matter. At the second session of the Council, in February 1920, Sir Eric Drummond submitted a list of ten eminent jurists as nominees for membership on an Advisory Committee of Jurists that would produce a draft plan for the Court.⁹ The Council approved the list and, although not all of those originally nominated were able to serve,¹⁰ the Committee of Jurists was able to meet at The Hague in the middle of June 1920.

A little over a month later, after 35 meetings, the committee produced a draft Statute which, except for reservations on specific points, enjoyed

⁸ Under Article 14 of the Covenant. See LEAGUE OF NATIONS SECRETARIAT, *supra* note 4, at 13-14.

⁹ These were: Akidzuki (Japan), Altamira (Spain), Bevilaqua (Brazil), Descamps (Belgium), Drago (Argentina), Fadda (Italy), Fromageot (France), Vesnitch (Kingdom of Serbs, Croats and Slovenes [Yugoslavia]), Loder (the Netherlands), Phillimore (Great Britain) and Root (the United States). The members of the League Secretariat serving the committee were to be Nippold and Winiarsky. Council Doc. 39, UK Public Record Office [hereinafter cited as PRO] General 195759/1362 FO 371/4313; PRO General 193165/1362 FO 371/4312; 1 LEAGUE OF NATIONS OFFICIAL JOURNAL [hereinafter cited as LNOJ] 122-23 (1920); 1 Minutes of the Council, Sess. 6, Ann. 62 (1920); Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux and Report, June 16-July 12, 1920 [hereinafter cited as Procès-Verbaux], Preface (1920); 1 Minutes of the Council, Sess. 2 and Ann. 5 (1920); and PRO General 192113/1362 FO 371/4312. See also Report by Léon Bourgeois to the Council, Feb. 13, 1920, 1 LNOJ at 33-37 and PRO General 192113/1362 *supra*. The second meeting of the League Organisation Committee, in June 1919, had instructed the then acting Secretary-General to prepare such a list of jurists, but the committee did not meet again. See C. KLUYVER, DOCUMENTS ON THE LEAGUE OF NATIONS 256, 283 (1920), cited in M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE: A TREATISE 114 (1943).

¹⁰ The Committee of Jurists finally contained five nationals of the great powers (the United States, Britain, Japan, France and Italy) and three nationals of former European neutrals (Norway, the Netherlands and Sweden), with the complement being made up by a Brazilian and a Belgian.

The committee, as constituted, was composed of: Baron Descamps (Belgium), Chairman; Dr. Loder (the Netherlands), Vice-Chairman; Mineichiro Adatci (Japan); Rafael Altamira (Spain); Raoul Fernandez (Brazil), who substituted for Clovis Bevilaqua (Brazil) until the 25th meeting when he formally replaced Bevilaqua; Arturo Ricci-Busatti (Italy); Albert de Lapradelle (France); Francis Hagerup (Norway); Lord Phillimore (Great Britain); and Elihu Root (the United States). Léon Bourgeois attended the meetings of the committee as the representative of the Council of the League, but he did not participate in the proceedings. Anzilotti (Under Secretary-General of the League of Nations) acted as Secretary-General of the committee, with Åke Hammarskjöld (a member of the Legal Section of the League Secretariat and future Registrar of the PCIJ) as his deputy. M. HUDSON, *supra* note 9, at 115-16; and PRO General 203188/25388 FO 371/4311.

the unanimous backing of all the jurists and provided for compulsory jurisdiction.¹¹ One of the reservations, however, concerned this matter. It came from Mineichiro Adatci of Japan, who was as unwavering in his opposition to compulsory jurisdiction as his colleagues were in its support.¹² Adatci had intimated his uneasiness over this question at the committee's meetings on June 26 and 30,¹³ but it was not until July 14 that he fully expounded his views to what he knew to be a body of men committed to compulsory jurisdiction. Appealing to the committee to be "modest and practical,"¹⁴ he argued that it would be contrary to the Covenant to grant such powers to the Court.¹⁵

¹¹ The relevant articles (Articles 33 and 34) stated:

Article 33

When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next Article.

Article 34

Between States which are Members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature, concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of reparation to be made for the breach of an international obligation;
- (e) The interpretation of a sentence passed by the Court.

The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court.

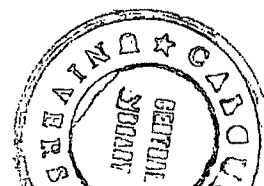
PCIJ Draft Scheme, LNOJ Spec. Supp. 2, at 9-10 (1920).

¹² Report by de Lapradelle, PRO W 320/241/98 FO 371/5480; Procès-Verbaux, *supra* note 9, at 727.

¹³ Procès-Verbaux, *supra* note 9, at 225; 260.

¹⁴ *Id.* at 541-43.

¹⁵ Article 13 had qualified the obligation to submit to arbitration by the inclusion of the word "generally." Its second paragraph enumerated categories of legal disputes that were "declared to be among those which are generally suitable for submission to arbitration." This categorization was eventually adopted in Article 36 of the Statute as being those disputes covered by the Optional Clause. Article 14, Adatci said, was "deliberately intended to limit the competence of the Court to cases submitted to it by the parties," and the League Council, being bound by the Covenant, could not delegate powers other than those granted to it under the Covenant. *See id.*



The rest of the committee (including the British national, Lord Phillimore,¹⁶ who played a leading role in the committee's work¹⁷) supported compulsory jurisdiction. This was partly because they believed that compulsory jurisdiction was a characteristic of a "true" court and partly because, as lawyers, their thinking about international organization for peace had been conditioned by the Hague Conferences of 1899 and 1907 and the predominantly legal approach that had been taken towards the problem of war before 1914. To a great extent, this approach had focused upon the attempt to develop judicial procedures for resolving disputes between states.

Towards the end of the 19th century, arbitration had become increasingly popular and a large number of arbitration treaties were negotiated. Clauses providing for arbitration were also inserted into a sizable number of treaties. After the first Hague Conference of 1899 established the Permanent Court of Arbitration,¹⁸ there were even more arbitration treaties negotiated and more arbitration clauses.¹⁹ The second Hague Conference of 1907 gave further momentum to the arbitration movement by recognizing that certain types of disputes (notably those relating to the interpretation of treaties) should be submitted to arbitration.

¹⁶ A former President of the International Law Association and Lord Justice of Appeal, Phillimore had chaired the Phillimore Committee, which produced the first official British draft Covenant.

¹⁷ When Descamps was elected Chairman of the committee, and Loder elected Vice-Chairman, Phillimore had feared that this might mean that his "propositions may lose weight." Telegram from Lord Phillimore, The Hague, June 16, 1920, PRO General 204150/201505 FO 371/3855. However, by allying himself with Root and getting the committee to take his draft as its working draft, he was able to ensure that this apprehension was unfounded. He submitted a draft article stating that "either of the parties may require the Court to exercise jurisdiction without any further assent on the part of the other party." He argued (in common with Descamps and Root) that the "Covenant is a law for the League of Nations; but the convention establishing the Court would be another." *Procès-Verbaux*, *supra* note 9, at 235-36. In an explanatory note, he argued that the members of the League "can give the Court any jurisdiction which they please, though it was not given in the original Covenant." See *id.*, Ann. 2, at 252, for Phillimore's draft article and his explanatory note; *id.*, Ann. 5, at 277-78, for his amendment to Descamps's transactional proposal; and *id.*, Ann. 4, at 547-48 for a later draft by Phillimore and Root.

¹⁸ The PCA consisted of a bureau and a list of jurists who were available to act as arbitrators and whose governments had nominated them to serve in this capacity. The list was kept at the Peace Palace at The Hague.

¹⁹ Nicolas Politis, the Greek diplomat and lawyer, calculated that between 1814 and 1914, arbitration had been extended by 70 special or compromissory clauses and 130 treaties; and that by 1914 there existed 139 arbitration treaties and 154 clauses were in operation between 47 states. Sir James Headlam-Morley (Historical Adviser to the Foreign Office) reported the calculations of two other writers on the number of arbitration treaties concluded between 1784 and 1914: according to one, there were 130, and according to the other, over 200. See N. POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* (1928); Memorandum Respecting the British Government and Arbitration. An Historical Review, Jan. 27, 1928, PRO W 748/28/98 FO 411/7, reprinted in J. HEADLAM-MORLEY, *STUDIES IN DIPLOMATIC HISTORY* (1930).

In practice, states' obligations to arbitrate were very limited indeed because there was almost invariably a reservation of disputes involving third parties or involving "honour, independence and vital interests"²⁰ — a phrase that enabled states to refuse arbitration whenever they saw fit. Similarly, although the United States was often seen as the standard-bearer in the arbitration movement, it actually ratified relatively few of the arbitration treaties it had negotiated.²¹

However, the Committee of Jurists looked back to the progress that had been made in gaining general acceptance of the *desirability* of compulsory arbitration and the rule of law in the prewar years and through the Hague Conferences. Two of the committee's members had attended the Hague Conferences in an official capacity,²² and the Chairman, Baron Descamps of Belgium, urged them to bear in mind that they were not confronted by a *tabula rasa*. Elihu Root of the United States had pointed out that Articles 12–14 of the Covenant of the League were vague and incomplete, but there was no official commentary on the Covenant that could clarify their meaning. Consequently, there was "all the more reason why the Committee should take into consideration the work of the two Hague Conferences," which "so strangely was forgotten in the drafting

²⁰ Hereinafter referred to as the vital interests formula.

²¹ This was because of the Senate's jealousy of its prerogatives in foreign affairs. In 1923 the then Secretary of State, Charles Hughes, summarized the record up to that date as follows: The 1897 Olney-Pauncefote Arbitration Treaty had been rejected by the Senate despite the firm support it had received from both the Cleveland administration, which had negotiated it, and the McKinley administration. The 12 Hay Treaties of 1904 had included the vital interests formula; had limited arbitrations to differences of a legal nature or of treaty interpretation that it had not been possible to settle by diplomacy; and had excluded disputes involving third parties. This was not enough for the Senate, which had amended the words "special agreement" in the Treaty (i.e., the *compromis*, in which the parties to an arbitration defined the nature of the dispute and set out the law that the arbitrators were to apply, as well as nominating the arbitrators) to "special Treaty." Under the American Constitution, this wording automatically required the Senate's approval of every arbitration. The administration let the treaties fall through rather than accept the amendment. When Elihu Root negotiated his Arbitration Treaties, he took account of Hay's failure by requiring that the *compromis* be made by the President with the advice and consent of the Senate. Three years later, Taft's Arbitration Treaty ran aground after numerous difficulties. The Senate struck out a provision that in the event of controversy over the justiciability of a dispute, it should be submitted to a joint high commission, as "an unconstitutional delegation of power." It inserted reservations of disputes involving the admission of aliens, territorial integrity, alleged indebtedness or monied obligation by any state and the Monroe Doctrine. These were unacceptable to the administration, which left the Treaty unratified: "In the light of this record," Hughes concluded, "it would seem to be entirely clear that until the Senate changes its attitude it would be a waste of effort for the President to attempt to negotiate treaties with the other powers providing for an obligatory jurisdiction of the scope stated in [the Optional Clause]." Letter from Charles Hughes to the U.S. President, Mar. 21, 1923, Ann. 1 to Memorandum by Lord Chelmsford (First Lord of the Admiralty), July 21, 1924, PRO W 6062/338/98 FO 371/10573.

²² Elihu Root and Francis Hagerup. Root's Legal Adviser, James Brown Scott, had also attended the Hague Conferences as had Anzilotti's Secretary, Åke Hammarskjöld, and Bourgeois, the representative of the Council.

of the Covenant at Paris. The Committee was obliged to make good this omission."²³ And this it did, urged on by those who managed, somehow, to interpret the "spirit of the Covenant" as pointing in this direction.²⁴

However, there was a further reason why the committee believed that the Court should have compulsory jurisdiction: the members envisaged a body that would not engage in arbitration as it had hitherto been understood, but in adjudication. The jurists on the committee believed that there were several important differences between arbitration and adjudication. Firstly, whereas arbitrators were chosen ad hoc by the parties to a dispute, judges belonged to an independent standing tribunal. Secondly, in arbitration the parties to a dispute had to agree on the law that the arbitrators were to apply. In adjudication, however, the court was bound by its statute, which set out the rules on whose basis it was to operate, including the law to be applied in every case it heard. Thirdly, and most importantly, parties to arbitration had to set out in the *compromis* their agreement to arbitrate and the precise nature of the dispute. In adjudication, however, the court was seen as having the powers of compulsory jurisdiction upon the application of any party to a dispute. "Arbitration means a combat before a combat," Loder had declared, whereas in a court, "The gracious consent of the adversary is no longer required: one can do without him."²⁵

²³ Procès-Verbaux, *supra* note 9, at 243.

²⁴ See, e.g., the remarks of Altamira of Spain, *id.* at 102 and 229, and the memorandum submitted by Loder of the Netherlands, "Unilateral Summons or Previous Agreement," *id.*, Ann. 1, at 251.

²⁵ Memorandum by Loder, *supra* note 24, at 249-51. His argument is elaborated in *The Permanent Court of International Justice and Compulsory Jurisdiction*, 2 BRIT. Y.B. INT'L L. 6 (1921-22). In 1927 Lord Phillimore explained that there were three distinctions between a court of justice and arbitration. In arbitration, he said, states had to agree to arbitrate, agree to the *compromis* and agree to the arbitrators. In a court of justice, the court and the judges were established and "the party complaining comes to the Court and says: 'Bring my adversary before you that he may answer.'" 69 PARL. DEB., H.L. (5th ser.), col. 107 (1927).

It is important to recognize that the word "arbitration" was used very loosely by governments, lawyers and laymen throughout the 1920s. A strict definition of the term is provided in Article 15 of the Hague Convention for the Pacific Settlement of International Disputes of 1899, 32 Stat. 1779, TS No. 392, which states: "International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of a respect for law." However, the term "arbitration" was frequently treated as synonymous with adjudication. Thus, in the preparatory documents for the Committee of Jurists, the League's Legal Adviser, van Hamel, had thought it necessary to discuss whether Articles 12, 13 and 15 of the Covenant allowed for the Court that was to be established under Article 14 of the Covenant to be arbitral or arbitral and judicial. He concluded that the Covenant allowed for a judicial organ. Memorandum Presented by the Legal Section of the League of Nations to the Advisory Committee of Jurists, in Permanent Court of International Justice, Advisory Committee of Jurists, Documents Presented to the Committee 117 (1920). This confusion may be due to the fact that the PCIJ, as established, did not have compulsory jurisdiction, and because of the novelty of the Court. People had not yet become used to distinguishing between the two procedures and there is sufficient similarity for the lay person to fail to perceive any difference. Additionally, however, it was usual in the 1920s to use the term "arbitration" to mean the pacific settlement of disputes by any means. For example, at the fifth (1924) League Assembly, Politis reported that "[c]ompulsory

Britain's Response to the Draft Statute

The draft Statute of the Court reached Britain at the end of July 1920 with the recommendation from the British Minister at The Hague that "[t]he project now accepted is in all important respects that drawn up by Lord Phillimore and Mr. Root, and represents a complete victory for the Anglo-American point of view."²⁶

However, this assessment did not impress the British Foreign Secretary, Lord Curzon, who, after learning what was in the document, minuted: "It would seem to me that Lord Phillimore or whoever represented us in framing this scheme must have been singularly oblivious to British interests."²⁷ Sir Eyre Crowe (who became the Permanent Under Secretary—the most senior official—in the Foreign Office in November 1920²⁸) endorsed the proposal by Sir Cecil Hurst (the Foreign Office Legal Adviser²⁹) that a committee of eminent lawyers should examine the draft Statute.³⁰ "It certainly must be very closely examined by the best and

arbitration is the fundamental basis of the proposed system [of the Geneva Protocol]." General Report submitted to the Fifth Assembly on behalf of the First and Third Committees, LNOJ Spec. Supp. 23, Ann. 30, at 482 (1924). In the First (Legal) Committee at the same Assembly, Limberg (the Dutch Vice-Chairman of the committee) explained that " 'arbitration' had been used in a very general sense as implying the idea of conciliation or of mediation; but compulsory arbitration in the legal sense meant the jurisdiction of the Permanent Court of International Justice, or of the Permanent Arbitration Court, or finally of a special arbitration tribunal." LNOJ Spec. Supp. 24, Minutes of the First Committee, at 20 (1924). Perhaps this is because the term had been inherited from prewar attempts to develop the legal machinery for the pacific settlement of disputes or perhaps it was used simply because it was a convenient shorthand term for a less elegant and more awkward phrase. The latter explanation seems more likely. However, although there was little exactitude in terminology, it is nearly always clear how the term was being used.

²⁶ Dispatch No. 607 from Sir Ronald Graham, The Hague, July 24, 1920, PRO General 209523/203188 FO 371/4311.

²⁷ Minute by Lord Curzon, Oct. 5, 1920, PRO W 512/241/98 FO 371/5480.

²⁸ A brilliant official, Crowe held the second most senior position in the Foreign Office as Assistant Under Secretary of State from 1912 to Nov. 27, 1920, when he was promoted to the top position of Permanent Under Secretary of State.

²⁹ Hurst subsequently served as a judge of the PCIJ from 1929 to 1946 and he was its President from 1934 to 1936.

³⁰ Hurst to Hankey, Sept. 28, 1920, PRO W 512/241/98, *supra* note 27. Maurice Hankey was Secretary to both the Cabinet and the Committee of Imperial Defence. In November 1919, to the chagrin of Curzon and the Foreign Office, the Cabinet decided that all League communications should go via a central office attached to the Cabinet and the Foreign Office was deemed to be concerned only "in a primary or secondary way." PRO General 154784/1362 FO 371/4310 (Nov. 10, 1919). *See also* PRO GT The War 146254/1362 FO 371/4310; General 206571/1362 FO 371/4313. This led to confusion in British policy towards the League and the PCIJ. Crowe refused to provide draft answers to parliamentary questions because he had no information. Minute, May 19, 1920, PRO General 199291/1362 FO 371/4311. In addition, the relevant papers were received too late for effective action to be taken (and were then received in too great a quantity). Although, in October 1920, Hankey had a Foreign Office official seconded to the Cabinet Secretariat and claimed that this satisfied the Foreign Office and made for efficiency (diary entry, Oct. 22, 1920, *cited in* 2 S.

sanest legal minds," he wrote.³¹

On August 13, a Cabinet committee was set up under the Lord Chancellor, Lord Birkenhead, to examine the draft Statute,³² but a breakdown in communications between the Foreign Office and the Cabinet Secretariat,³³ combined with the illness of Birkenhead, led to deferment of the decision making until the last moment—just before the League Council met to discuss the draft Statute in October 1920.

The British documents relating to the draft Statute are markedly hostile to the Court. Sir Eyre Crowe thought that "expert opinion" held that the Permanent Court of Arbitration had "everything that is practically required and practically valuable,"³⁴ and the memoranda of the top Legal Advisers to the Government (who were unconnected with the Foreign Office) held that the establishment of the proposed Court was not, at that time, desirable.³⁵

The objections to the PCIJ were heavily influenced by Britain's experience during the First World War. Its naval blockade of Germany had played a major role in winning victory but had caused friction with the United States until 1917 (when America entered the war) and with the neutral states of Scandinavia and Holland throughout the war. This friction focused on the interpretation of belligerent maritime rights, that is, the international law governing naval warfare. Britain had maintained "high" belligerent maritime rights, an interpretation of the law that gave the British Navy wide freedom of action. The neutral states, on the other hand, powerlessly argued for "low" belligerent maritime rights, or greater restrictions on the freedom of action of the navy of a belligerent state.³⁶

ROSKILL, HANKEY—MAN OF SECRETS 192–93 (1972)), confusion and Foreign Office irritation continued until the fall of Lloyd George in October 1922. Crowe then seized the opportunity of immediately halting Hankey's receipt of Foreign Office telegrams and dispatches. With his large secretariat threatened by the ax of the incoming Prime Minister, Bonar Law, Hankey decided to return League business to the Foreign Office immediately and thereby save expense. *See id.* at 304–05.

³¹ Minute, Aug. 14, 1920, PRO W 512/241/98, *supra* note 27.

³² Cabinet meeting, Aug. 13, 1920, PRO CAB 48(20), *id.*

³³ Hankey to Hurst, Sept. 30, 1920, PRO W 519/241/98 FO 371/5480. *See also* Minutes by Crowe and Tufton (Head of the Western Department, which was "responsible" for the League in the Foreign Office), Oct. 5, 1920 and Oct. 1, 1920, respectively, PRO W 512/241/98, *supra* note 27.

³⁴ Minute, Oct. 5, 1920, *supra* note 27.

³⁵ *See* note by the Attorney-General (Sir Gordon Hewart), Sept. 28, 1920, PRO CP 1905 CAB 24/112; Memorandum by the Law Officers of the Crown, Oct. 14, 1920, PRO CP 1962 CAB 24/112.

³⁶ In respect of the United States, Britain had in fact given assurances of cooperation should the former hold that British steps to enforce the orders-in-council of March 1915 and February 1917 were not in accordance with international law. This was because of special considerations connected with Anglo-American relations and treaty obligations that did not arise in respect of the European neutrals. *See* letter from the Procurator General to the then Permanent Under Secretary of State for Foreign Affairs (Lord Hardinge), Apr. 19, 1920, and Minute by Hurst, May 1, 1920, PRO T 4144/329 FO 372/1438; Minute (signature illegible), Aug. 7, 1920, T 8980/504/98 FO 372/1438. Throughout the 1920s, the issue of belligerent maritime rights was used as one of the major arguments against

Sir Eyre Crowe's whole argument was based on looking at "what might and would have happened in the time of our greatest national peril": the Great War. Had the International Court existed during the war, he said, Britain would then have "had to choose between losing the war or defying the International Court."³⁷

In addition to differences governing the laws of naval warfare, there was also believed to be a difference between the "Anglo-Saxon" (i.e., Anglo-American) approach to international law and the "continental" (i.e., European) approach to international law. It was inevitable that the majority of judges on the Court would be "continental" lawyers or would follow that school (for example, the Latin Americans). By virtue of sitting at The Hague they would be exposed to the "pernicious influence of extreme German doctrines" for, said Crowe, The Hague itself and Dutch professors of international law were pro-German and anti-English.³⁸ Another fear, which was expressed by the Law Officers of the Crown, was that the judges would inevitably divide on national lines.³⁹ Finally, it was held that Britain could not commit future governments to execute the judgments of the Court. Some judgments could conceivably require parliamentary sanction, which might not be forthcoming. Similarly, there was nothing to ensure that the other party to a dispute would comply with an adverse decision.⁴⁰

By the time the Ministerial Conference met to consider the proposed Court on October 18,⁴¹ Britain was aware that the Italians and Japanese

Britain's accepting the Optional Clause. The issue is fully discussed in the report of a Cabinet subcommittee set up in 1927 after the Foreign Secretary, Austen Chamberlain, concluded that belligerent maritime rights was the one question that made war between Britain and the United States not just possible, but probable, unless Anglo-American differences on this score were settled. *See* Second Report of the Sub-Committee of the Committee of Imperial Defence on Belligerent Rights, Mar. 6, 1929, B.R. 82 (General 91/5), in 6 DOCUMENTS ON BRITISH FOREIGN POLICY, ser. 1A, App. III (1975).

³⁷ Minute by Crowe, Aug. 2, 1920, PRO General 20955/203188 FO 371/4311. As it was, Britain still faced outstanding claims from ex-neutrals and it was taken as axiomatic that if the Court had retrospective jurisdiction it would reverse British decisions and order Britain to pay heavy compensation. It was thus made clear that the Court should not have this jurisdiction and that its judgments should not constitute binding precedents. *See* PRO CP 1962 CAB 24/112 and Draft Conclusions of a Conference of Ministers, Oct. 18, 1920, PRO W 1149/241/98 FO 371/5480.

³⁸ Minute by Crowe, *supra* note 34.

³⁹ PRO CP 1962 CAB 24/112.

⁴⁰ Minute by Crowe, *supra* note 34. Other objections were Britain's "unhappy experience" of arbitration (Draft Scheme for a PCIJ, Note by the Attorney-General (Confidential), Sept. 28, 1920, CP 1905 CAB 24/112) and that as long as the United States was not a member of the Court, Britain should have nothing to do with it (*id.*; *see also* Minute by Crowe, Oct. 14, 1920, PRO W 933/241/98 FO 371/5480).

⁴¹ I.e., a meeting (by which Prime Minister Lloyd George did not consider himself bound) of those Cabinet Ministers who might be interested in subjects on the agenda and whom he chose to invite. Those who attended were Lloyd George, Balfour (Lord President of the Council), Chamberlain (Chancellor of the Exchequer), Milner (Secretary of State for the Colonies), Curzon (Foreign Secretary) and Fisher (President of the Board of Education). Hewart (Attorney-General), Hurst (Legal Adviser to the Foreign Office) and Crowe (Permanent

were opposed to compulsory jurisdiction,⁴² and Arthur Balfour,⁴³ who was to represent Britain at the imminent League Council meeting, had dismissed compulsory jurisdiction as a proposition that would hardly stand discussion.⁴⁴ However, not only did the Ministers decide to reject compulsory jurisdiction, but they also decided that "the whole scheme should be referred back to the Drafting Committee to explore the practical difficulties."⁴⁵

Nevertheless, when the League Council met a few days later, it did not reject the draft Statute. Presumably because of the widespread international support for the establishment of a court, Balfour thought that Britain should not appear to be obstructive.⁴⁶ Accordingly, he tried to achieve his aims by less comprehensive means, and was successful. A few days later, Sir Cecil Hurst was able to report that "Mr. Balfour with great adroitness succeeded in eliminating, with the consent of his colleagues on the Council, all these objectionable features of the scheme."⁴⁷

Cecil Hurst, Dionisio Anzilotti⁴⁸ and Joost-Adrian van Hamel⁴⁹ had jointly drafted the amendments that deprived the Court of its compulsory jurisdiction, while Léon Bourgeois⁵⁰ produced the report in which the

Under Secretary of the Foreign Office) were also present. PRO W 1149/241/98 FO 371/5480.

⁴² Britain had been informed of Italian objections at the 8th meeting of the League Council, and the Japanese objections had been delivered in a private memorandum to the Foreign Office on Sept. 4, 1920. PRO General 213646/203138 FO 371/4331. *See also* M. HUDSON, *supra* note 9, at 118.

⁴³ A former Unionist Prime Minister and Foreign Secretary from 1916 to 1919, Balfour was now Lord President of the Council.

⁴⁴ Memorandum by Balfour, Oct. 11, 1920, PRO CP 1956 CAB 24/112.

⁴⁵ Minutes of Conference of Ministers, Oct. 18, 1920, PRO W 1149/241/98 FO 371/5480. *See also* Fisher diary entry, Oct. 14, 1920 (*recte* Oct. 18, 1920), H. A. L. Fisher Papers 8A (on deposit in Bodleian Library, University of Oxford).

⁴⁶ Memorandum, *supra* note 44.

⁴⁷ Minute by Hurst, Oct. 29, 1920, PRO W 1504/241/98 FO 371/5480. The relevant articles now stated:

Article 34

La compétence de la Cour est réglée par les articles 12, 13 et 14 du Pacte.

Article 35

Sans préjudice de la faculté conférée par l'article 12 du Pacte, aux parties à un litige de le soumettre soit à la procédure judiciaire ou arbitrale, soit à l'examen du conseil, la Cour connaîtra sans convention spéciale des litiges dont le règlement est confié à elle ou à la juridiction instituée par la Société des Nations, aux termes des traités en vigueur.

LEAGUE OF NATIONS, DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL OF THE LEAGUE OF NATIONS UNDER ARTICLE 14 OF THE COVENANT AND THE ADOPTION BY THE ASSEMBLY OF THE STATUTE OF THE PERMANENT COURT [hereinafter cited as LEAGUE DOCUMENTS], Synopsis of Amendments to the Draft Scheme 41 (1920).

⁴⁸ Under Secretary-General of the League.

⁴⁹ Director of the Legal Section of the League.

⁵⁰ A former Minister of Foreign Affairs, Bourgeois had been First French Delegate to the Hague Conferences of 1889 and 1907. He had chaired the committee that produced the official French draft of a League Covenant.

Council explained its decisions regarding the Statute.⁵¹ The section of the report dealing with the Court's jurisdiction (which drew heavily on Britain's observations⁵²) argued that the inclusion of compulsory jurisdiction would have involved a modification of the Covenant and that it was inopportune to go further than the framers had intended.⁵³ Amendments were also introduced with the explicit aim of preventing the Court from asserting authority in disputes involving prize, a subject that loomed large in British thinking about the Court.⁵⁴

These actions by the Council fulfilled its mandate under Article 14 of

⁵¹ Following a brief discussion of the draft Statute at the beginning of August, the Council had adopted a report drafted by Bourgeois. This report had outlined some difficulties that the Council envisaged with regard to the judges of the Court and the element of compulsion. Bourgeois had then been asked to continue his study of the subject and was, accordingly, the drafter of the "elaborate report to the Council." M. HUDSON, *supra* note 9, at 118.

⁵² In a written note that began by stating that the "British Cabinet fully recognize the importance of providing a Permanent Tribunal without delay," Balfour argued that the drafters had "evidently" never intended that one party should be able to compel another to go to the Court and that this had been a deliberate choice since the question of compulsory arbitration had "been before the legal authorities of the world now for many years" and it "had always been rejected whenever it had been brought up for practical decision." Note on the Permanent Court submitted by Mr. Balfour to the Council of the League of Nations, LEAGUE DOCUMENTS, *supra* note 47, at 38. See also J. WHEELER-BENNETT & M. FANSHAW, INFORMATION ON THE WORLD COURT 1918-1928, at 63-64 (1929).

⁵³ The draft that the Committee of Jurists had presented would have enabled the Court, rather than the League Council, to decide when diplomatic methods of settling a dispute had been exhausted and whether the dispute should go to the Court, the Council or some other international tribunal. It could do this before the Council had considered the dispute. But the Covenant had given freedom of choice to League members under Article 12. Furthermore, although the Council was not opposed to the actual idea of compulsory jurisdiction on questions of a judicial nature, several of its members had objected to the term "any point of international law." Report presented by the French Representative, M. Léon Bourgeois and adopted by the Council, LEAGUE DOCUMENTS, *supra* note 47, at 46-47.

⁵⁴ Hurst had pointed out that the draft Statute "produces in fact in an even balder manner all that the scheme for the creation of an international prize court would have achieved. That scheme . . . was rejected by Great Britain, and most people now think wisely rejected." Hurst to Hankey, *supra* note 30. After the Convention for an International Prize Court was opened for signature in 1907, it quickly became apparent that its ratification would be dependent upon the question of which law the Prize Court was to apply. Accordingly, the 1908 Declaration of London clarified the law of maritime warfare that was to be applied by the Court. In 1910 a bill was introduced into Parliament to provide for appeals to the International Prize Court, but the bill was withdrawn. A second bill was passed by the Commons in 1911 but was rejected by the Lords. A provision was also added to prevent the operation of the principle *stare decisis*. The Ministers Conference in October 1920 had declared:

The scheme was detrimental to us as a sea Power since it would enable predominantly land Powers to build up a code of international law which would fetter the exercise of our sea power. Unless precaution was taken to prevent its application being made retrospective, it would even enable appeal to be made against the decisions of our prize courts in the late war.

PRO W 1149/241/98 FO 371/5480. Although there was no question of Britain's accepting compulsory adjudication, it was thought that the small states might use a system of precedent to put pressure on Britain. See Minute by Crowe, *supra* note 34. See also M. HUDSON, *supra* note 9, at 207-08.

the Covenant and the draft Statute was now submitted to the Assembly of the League.

II. THE EMERGENCE OF THE OPTIONAL CLAUSE

When the first Assembly met at Geneva in November–December 1920, it was immediately apparent that the great and small powers were sharply opposed over the question of the Court's competence. The attitude of the small powers in favor of compulsory jurisdiction was conditioned by the large number of lawyers who represented them in the Assembly, by the legalist approach to international relations of certain states (notably Holland and the Scandinavian states) and by the widely held belief that compulsory jurisdiction would be advantageous to small states. It was expected that the Court would redress the differences of power between the weak and the strong that had just been institutionalized in the League Council. An international court with compulsory jurisdiction would provide the weak with a forum where they could take their grievances against the strong and where the outcome would not be decided by the number of guns or economic power of a state. In other words, the small stood to gain what Britain stood to lose.

The Assembly delegated consideration of the draft Statute to the Third (Legal and Constitutional) Committee, which was chaired by Léon Bourgeois, the Frenchman who had written the report for the Council the previous October. In turn, a small subcommittee of the Third Committee undertook the major task of examining in detail the draft Statute and the amendments that had been submitted.⁵⁵ Britain, France and Japan were soon revealed as opponents of compulsory jurisdiction; the Belgians, Portuguese and South Americans⁵⁶ were proponents; and Greece, the Netherlands and Norway saw the necessity of accepting Bourgeois's injunction that they should "calculate the limits of the possible."⁵⁷ In due course, the subcommittee reported that compulsory jurisdiction could not be reinserted in the Statute because this would prevent the Assembly from obtaining the unanimity essential for the establishment of the Court.⁵⁸

One member of the Third Committee was unwilling to accept defeat. Raoul Fernandez⁵⁹ of Brazil, who had ardently championed compulsory

⁵⁵ The subcommittee contained five members of the Committee of Jurists: Adatci, Fernandez, Hagerup, Loder and Ricci-Busatti; and five others appointed by the Bureau of the Third Committee: Doherty (Canada), Fromageot, Huber (Switzerland), Hurst and Politis. Amendments that would have reintroduced compulsory jurisdiction had been submitted by Argentina, Colombia, Spain and Panama. LEAGUE DOCUMENTS, *supra* note 47, at 43.

⁵⁶ I.e., Brazil, Panama, Colombia and Argentina. See League of Nations, Records of the First Assembly, Minutes of the Third Committee [hereinafter cited as 1920 Minutes of the Third Committee], at 285–86 and 291; Minutes of the Sub-Committee of the Third Committee, *id.* at 381–85.

⁵⁷ 1920 Minutes of the Third Committee, *supra* note 56, at 280 and 288–89.

⁵⁸ Report submitted to the Third Committee by M. Hagerup on behalf of the Subcommittee, *id.*, Ann. 7, at 533.

⁵⁹ His name is sometimes spelled "Fernandes" both in League documents and in the relevant literature.

jurisdiction in the Committee of Jurists, remained equally determined to get it now. Yet he was also determined to have the Assembly assert its authority and aggrandize its power at the expense of the Council. Accordingly, he insisted that the Assembly should be allowed to discuss the amendments dealt with by the subcommittee. Hurst, Henri Fromageot of France and Francis Hagerup of Norway vainly appealed to him not to try to amend the plan for the Court when it came before the plenary sessions. If he must, he could submit the amendments for a separate discussion during the plenary meetings. However, Fernandez insisted on his right to raise the matter in whichever way best suited him. He proposed, therefore, that the Assembly approve the Statute of the Court subject to its ratification by the League's members. At the same time, he proposed that the Assembly approve an alternative Article 36 (the article relating to the competence of the Court, which did *not* provide for compulsory jurisdiction), which was practically identical to the compulsory jurisdiction proposal of the Committee of Jurists.⁶⁰ Then, when they deposited their ratifications to the Protocol establishing the Court, the members of the League would indicate which version of Article 36 they adhered to, that drawn up by the Committee of Jurists or that produced by the League Council at its October meeting.

Fernandez claimed that this scheme would reconcile the views of the advocates and opponents of compulsory jurisdiction. More specifically, he argued that it would meet the objections of the great powers that compulsory jurisdiction was beyond the scope of the Covenant inasmuch as his proposal would itself have "the character of an amendment to the Covenant" (and would therefore require ratification).⁶¹ However, unless he thought that the pressure of "world public opinion" would shame all the great powers into accepting the alternative draft article, his proposal makes little sense.⁶² Had it gone through, it would merely have led to the coexistence of two treaties that differed only in respect of one article.

⁶⁰ I.e., Art. 34(1) of the draft Statute (*see* note 11 *supra*). 1920 Minutes of the Third Committee, *supra* note 56, at 298-301, and Ann. 11, at 553.

⁶¹ Legally speaking, under Article 26 of the Covenant, any amendment to the Covenant required ratification by all the members of the Council and the majority of the members of the Assembly. Fernandez explained that his proposal would strengthen the authority of the Assembly *vis-à-vis* the Council since "the risk of establishing a precedent dangerous to the authority of the Assembly would be avoided." 1920 Minutes of the Third Committee, *supra* note 56, at 302. In this connection, Hudson notes:

The term "statute" seems to have expressed a certain consideration for the feelings of those delegates in the Assembly who insisted on the creation of the Court by the action of the Assembly itself; at the same time, it distinguished the action taken by the Assembly from the ordinary *resolutions* adopted by that body.

M. HUDSON, *supra* note 9, at 122.

⁶² Similar proposals had in fact been made earlier, but they had not been clung to with such tenacity. *See* the proposals put forward to the Committee of Jurists by Ricci-Busatti of Italy, Procès-Verbaux, *supra* note 9, at 246 and 582; and by his countryman, Tittori, to the League Council, Extract from the Report of the Deliberations of the Council for Diplomatic Litigation attached to the Italian Ministry of Foreign Affairs, 1920 Minutes of the Third

Fernandez's proposal was considered by the subcommittee on December 10.⁶³ Other draft formulas for the Assembly resolution had been submitted by Fromageot of France, Max Huber of Switzerland and Arturo Ricci-Busatti of Italy. Whereas the latter merely suggested a resolution giving the Assembly's approval of the establishment of the Court,⁶⁴ Huber and Fromageot attempted to meet Fernandez's demands. Huber suggested that, if necessary, this should be by the introduction "of a new annex to the Covenant which would provide for the co-existence of the two articles."⁶⁵ Fromageot, on the other hand, proposed that those who so wished be allowed to accept the *additional optional obligation* of compulsory jurisdiction.⁶⁶

The minutes of the meeting do not give any indication of its tone. They record that the subcommittee toyed with various combinations of the formulas⁶⁷ before settling on the one that had been submitted by Fromageot.⁶⁸ The formula that was to be inserted into the Statute of the Court was to constitute an *additional optional obligation* and not an amendment to the Covenant. It would be subject to reciprocity and states could specify the issues on which they accepted this obligation. Later that same day, the Third Committee met as a whole and agreed on amendments to

Committee, *supra* note 56, Ann. 2, at 498-99. See also proposals put forward at the Assembly by Politis and Huber, Minutes of the Sub-Committee of the Third Committee, *id.* at 380, 381, and the report of the Sub-Committee of the Third Committee, *supra* note 58, at 532-34.

⁶³ Bourgeois, the Chairman of the Third Committee, had suggested that the question be considered by a special subcommittee consisting of Hagerup (in the Chair), Fromageot, Hurst, Politis and Ricci-Busatti. It was decided, however (on the advice of Huber, Ricci-Busatti and Adatci), that the importance of the question called for a meeting of the full subcommittee. 1920 Minutes of the Third Committee, *supra* note 56, at 308.

⁶⁴ *Id.*, Ann. 35, at 612.

⁶⁵ *Id.*, Anns. 36 and 36a, at 613, 614.

⁶⁶ *Id.*, Ann. 34a, at 611.

⁶⁷ Hagerup suggested combining parts of the formulas put forward by Fromageot, Huber and Fernandez. (The minutes incorrectly record Hagerup's draft. See *id.*, Ann. 37, at 615, and Minutes of the Third Committee, *id.* at 407.) Politis suggested combining parts of Fromageot's and Fernandez's formulas. See *id.*, Ann. 38, at 616.

⁶⁸ Draft Formula submitted by M. Fromageot of form to be given to the Constitution of the Court, Minutes of the Sub-Committee of the Third Committee, *id.*, Ann. 34a, at 611. During the discussion, it became clear that there was scarcely any difference in principle between any of the drafts that had been suggested as a result of Fernandez's demands. These provided that

the vote of the Assembly would result in the establishment of the Court as an organisation under the League of Nations, while the jurisdiction of the Court *ratione personae* would be determined by the ratifications of the States. Thus all the Members of the League would be bound to take part in the election of judges and to bear their shares in the expenses of the Court, as soon as its organic Statute came into force, whereas only such Members would be justiciable by the Court as had signed and ratified the Statute.

Id. at 408. During the course of the meeting, Fromageot drafted a new section that formed the basis of the Assembly resolution approving the Statute of the Court. See *id.*, Ann. 34, at 610; and M. HUDSON, *supra* note 9, at 122-24.

enable states to accept the obligation at any time after their acceptance of the Court's Statute, to impose time limits on it, and to make it entirely clear that the Court could determine its own competence.⁶⁹ They became paragraphs 2 and 3 of Article 36 of the Statute and were included in the form given at the beginning of this article. Thus, the Optional Clause was born.

In practical terms, the Optional Clause was scarcely different from Fernandez's alternative article, but Fernandez was bitterly disappointed. It was "inadmissible," he argued, "for a State to accept the principle of compulsory jurisdiction without knowing exactly towards whom it accepted such obligation."⁷⁰ On December 13, when the Assembly discussed the Court, he pointed an accusing finger at the Council that had frustrated his hopes and declared that "I was once enthusiastic; today I am barely confident. I am waiting."⁷¹ His disappointment and anger were echoed by most of the small states and all of the Latin Americans. "A minority of delegations has once more paralyzed the will of the majority," complained Lafontaine of Belgium.⁷² "You are promising us justice for tomorrow, but you are not giving it to us today," cried Tamaya of Bolivia.⁷³ Loder of Holland warned the great powers: "You are fighting against time, you will do so in vain."⁷⁴

Not all states expressed this anger. Hagerup of Norway, Demètre Negelescu of Romania, Giuseppe Motta of Switzerland and Nicolas Politis of Greece recognized that a consensus was required to establish the Court and that the present proposal offered a springboard for the future.⁷⁵ While acknowledging the significance of the occasion, *The Times* recorded that the proceedings were "particularly dreary": the afternoon had been "spent in a succession of unremarkable speeches by the delegates of smaller States"⁷⁶ and at least one delegate had addressed an almost empty

⁶⁹ See 1920 Minutes of the Third Committee, *supra* note 56, at 312-17.

⁷⁰ *Id.* at 312.

⁷¹ League of Nations, Records of the First Assembly, Plenary Meetings [hereinafter cited as 1920 Plenary Meetings], at 449.

⁷² *Id.* at 447.

⁷³ *Id.* at 489. Cf. speeches by Blanco (Uruguay) and Arias (Panama), *id.* at 448 and 457; and by Urrutia (Colombia), Cornejo (Peru) and Aguero (Cuba), *id.* at 481, 483, and 487. Wellington Koo (China) and Costa (Portugal) also argued for compulsory jurisdiction. *Id.* at 482 and 485.

⁷⁴ *Id.* at 445.

⁷⁵ See *id.* at 455, for the remarks of Negelescu (Romania); *id.* at 492 and 490, for those of Hagerup and Motta (Switzerland). Politis countered the accusation of Lafontaine (Belgium) by arguing:

There was no majority which submitted to the rule of the minority; that would have been illogical and contradictory. A unanimous opinion was arrived at because it was understood that unanimity was the only means of attaining immediately the possible minimum; that is to say, a Permanent and Judicial Court which, however, should not at present be compulsory.

Id. at 482-83.

⁷⁶ *The Times* (London), Dec. 14, 1920, at 11.

hall.⁷⁷ Balfour, the leader of the British delegation, and Bourgeois for France contented themselves with explaining that their states had always supported compulsory arbitration but that the Court had first to prove itself; in time, confidence in the Court would increase. As Bourgeois remarked, "[T]his confidence cannot be imposed any more than credit can be imposed."⁷⁸

Finally, after almost six hours and three-quarters of debate, the Assembly passed a unanimous resolution approving the Statute of the Court for submission by the League Council to members of the League for ratification,⁷⁹ and Hymans, the Belgian President of the Assembly, dismissed it with the words, "[W]e have accomplished a great work."⁸⁰

The following day, December 14, the Council approved the Protocol of Signature, which had been prepared by the League Secretariat.⁸¹ It was submitted to the Assembly on December 17 and made available for signature on that day and the next.⁸² Twenty-one League members signed the Protocol and four of these also signed the Optional Clause at the Assembly.⁸³ Of these, only Switzerland and Denmark had ratified the Optional Clause when the second Assembly opened in September 1921 (although, in the meantime, an additional three states had also adhered to the clause).⁸⁴ By then, a sufficient number of states had deposited their ratifications of the Protocol establishing the Court for the Assembly to go ahead with electing the judges and for the establishment of the Court. By February 15, 1922, when the Court was formally opened, there had been 31 ratifications of the Statute, and nine declarations accepting the Optional Clause had entered into force.⁸⁵ Ironically, Fernandez is generally credited as being the author of the clause he so bitterly condemned⁸⁶ and, although

⁷⁷ See the comment by Hymans (the Belgian President of the Assembly) on the speech by Zolger (Serb-Croat-Slovene State) that opened the afternoon proceedings. 1920 Plenary Meetings, *supra* note 71, at 479.

⁷⁸ For Bourgeois's speech, see *id.* at 493-95; and for Balfour's speech, see *id.* at 487-89. Cf. speech by Schanzer (Italy), *id.* at 484.

⁷⁹ See Ann. 1 to M. HUDSON, *supra* note 9, at 665.

⁸⁰ The Times, *supra* note 76.

⁸¹ 1 Minutes of the Council, Sess. 11, Conclusion 273, at 35 (1920). The minutes suggest that there was no discussion of the Protocol of Signature.

⁸² 1920 Plenary Meetings, *supra* note 71, at 641-42. See also M. HUDSON, *supra* note 9, at 124-25. The Protocol of Signature is, however, dated Dec. 16, 1920.

⁸³ Denmark, El Salvador, Portugal and Switzerland.

⁸⁴ Portugal ratified on Oct. 8, 1921 (the date of deposit of ratification of the Protocol of Signature) and El Salvador ratified on Aug. 29, 1930 (the date of deposit of ratification of the Protocol of Signature). The states that had accepted the Optional Clause in 1921 before the second Assembly opened were the Netherlands (Aug. 6, 1921), Sweden (Aug. 16, 1921) and Bulgaria (Aug. 12, 1921, the date of deposit of the ratification of the Protocol of Signature). Five additional states had signed but not ratified their declarations by the opening of the Assembly: Luxembourg, Liberia, Uruguay, Costa Rica and Finland. During the Assembly, Haiti and Uruguay deposited ratifications of the Optional Clause (Sept. 7 and 27, respectively).

⁸⁵ I.e., Bulgaria, Denmark, Haiti, the Netherlands, Norway, Portugal, Sweden, Switzerland and Uruguay. Seventeen states in all had signed the Optional Clause.

⁸⁶ See, e.g., J. WHEELER-BENNETT & M. FANSHAW, *supra* note 52, at 66; Verzijl, *The System of the Optional Clause*, 1 INT'L REL. 585 (1959); M. HUDSON, *supra* note 9, at 126.

Brazil had signed and ratified the Optional Clause before the Court opened, the Brazilian declaration stated that it would not come into effect until two permanent members of the League Council ratified it⁸⁷—a condition that was not met until February 5, 1930, when Britain deposited its ratification of the Optional Clause.

III. BRITAIN AND THE PERMANENT COURT

The Establishment of the Court, 1921–1922

The Foreign Office had played no part in the negotiations over the Court Statute in December 1920. Its first news of the Assembly's sessions was gleaned from reports in *The Times*, and when the report of the Third Committee reached the Foreign Office on December 22, 1920, it made little sense since the Foreign Office did not have a finalized draft of the Statute.⁸⁸ Even when copies of the Assembly resolutions and the Statute of the Court did arrive, on January 1, 1921, it was still unable to take action since it did not know whether Britain and the Dominions had signed. That they had done so was only known on receipt of a telegram from Drummond on January 13.⁸⁹ By then, the lack of enthusiasm for the Court that had been manifested at the Ministerial Conference the previous October⁹⁰ and in the warnings of Sir Eyre Crowe⁹¹ had apparently turned into a policy of procrastination. "Continue policy of masterly inactivity,"⁹² suggested G. H. Villiers, the Head of the Foreign Office department dealing with League affairs.

The ratification of Britain's adhesion to the Protocol of Signature of the Statute of the Court was considered by the Cabinet on February 18. The Admiralty made sure that its still strong fears about belligerent maritime rights were fully taken into account by circulating a memorandum explaining that the "Admiralty have been watching with anxiety the sudden development of this Permanent Court. Unless the British view is openly stated and the functions of the Court strictly limited, some of the

⁸⁷ According to Fernandez, this was because:

[W]hen I returned to my country, when I reported on our work and gave my Government my opinion, I said: I think it only right that, by adhering to the clause concerning the compulsory jurisdiction of the Court, we should emphasise that, over and above the legal and political necessities, the great Powers which have a preponderating voice in establishing the composition of the Court are morally bound to set the example of submitting to its jurisdiction.

Assembly Plenary Meeting, LNOJ Spec. Supp. 33, at 84 (1925).

⁸⁸ Minute by G. H. Villiers (Head of the Western [League of Nations] Department), Dec. 23, 1920, PRO W 3467/241/98 FO 371/5480.

⁸⁹ Minute by H. Malkin (Assistant Legal Adviser to the Foreign Office who became Legal Adviser in 1929 when Hurst was elected a judge of the PCIJ), Jan. 6, 1921, PRO W 22/22/98 FO 371/7033; and Spicer (the Foreign Office official attached to the Cabinet office) to Villiers, Jan. 13, 1921, PRO W 573/22/98 FO 371/7033.

⁹⁰ See text at notes 41–45 *supra*.

⁹¹ See text at notes 34–40 *supra*.

⁹² Minute by Villiers, Jan. 15, 1921, PRO W 573/22/98 FO 371/7033. Cf. Minute by Tufton (who had recently moved from being Head of the Western Department to Head of the Central Department), Dec. 4, 1920, PRO W 2766/241/98 FO 371/5480.

principal methods by which our Sea Power is exercised may be seriously jeopardised, if not, indeed nullified."⁹³ However, as Birkenhead (the Lord Chancellor) pointed out, belligerent maritime rights were not jeopardized and there were no other valid objections to the establishment of the Court since Britain was not bound by the Optional Clause. The Attorney-General, Sir Gordon Hewart, had already advised that Britain should "absolutely refuse" to consent to compulsory jurisdiction⁹⁴ and, at the request of the Admiralty, this was explicitly stated. This being so, the Cabinet decided that "the British Government had really no alternative but to ratify the Protocol."⁹⁵ That, as far as the Cabinet was concerned, was that.

Approval of the wording that the Treaty Department had suggested for ratifying the Protocol was given on March 9, 1921, and, on March 14, it was forwarded to the India and Colonial Offices for approval by the Dominions and India.⁹⁶ Distance and lack of any effective machinery for coordinating imperial policy (in addition to the inexperience of the Commonwealth countries in international affairs) meant that there was a delay in obtaining the necessary agreement. By mid-April, only New Zealand had assented to Britain's ratifying the Protocol of Signature of the Statute on its behalf,⁹⁷ but a month later Australia, South Africa and India had all assented to ratification of the Protocol.⁹⁸ Canadian assent was slower in arriving because it was necessary to pass a bill of ratification through its Parliament, which did not happen until the end of June.⁹⁹

In the meantime, in April 1921, President Harding of the United States had finally come out against joining the League. Until then, Harding had maintained an ambiguous attitude, which led Curzon to comment that he had "no mind on the matter at all or rather that he had several minds

⁹³ Memorandum by the First Lord of the Admiralty (Lord Lee of Fareham) (Secret), Jan. 29, 1921, PRO CP 2507 CAB 24/119.

⁹⁴ Memorandum by the Attorney-General (Sir Gordon Hewart), Jan. 3, 1921, PRO W 291/22/98 FO 371/7033.

⁹⁵ Minutes of Cabinet meeting, Feb. 18, 1921, PRO CAB 8(21) W 2008/22/98 FO 371/7033.

⁹⁶ PRO W 4911/22/98; W 5169/22/98 FO 371/7034. Although the Treaty Department had submitted a draft based upon the "usual procedure," i.e., that the King made one ratification on behalf of the whole Empire, the developing stature of the Dominions meant that it was no longer possible to assume that they would automatically agree. Minute by Malkin, Feb. 24, 1921, PRO W 2008/22/98 FO 371/7033.

For a general discussion of the Dominions' and India's entry onto the world stage, see, for example, G. CARTER, *THE BRITISH COMMONWEALTH AND INTERNATIONAL SECURITY. THE ROLE OF THE DOMINIONS 1919-1939*, Introduction and ch. 1 (1947); N. MANSERGH, *THE COMMONWEALTH EXPERIENCE*, vol. 1, ch. 6 and vol. 2, ch. 1 (2d ed. 1982); R. HOLLAND, *BRITAIN AND THE COMMONWEALTH ALLIANCE 1918-1939* (1981).

⁹⁷ PRO W 4641/22/98 FO 371/7033.

⁹⁸ PRO W 5158/22/98; W 5463/22/98 FO 371/7034. Australia had replied that Prime Minister Hughes would sign the ratification when he arrived in England for the meeting of the imperial Prime Ministers, which was to begin on June 20.

⁹⁹ PRO W 5218/22/98 FO 371/7034; W 6399/22/98; W 6760/505/98; W 7599/22/98 FO 371/7035.

which changed from day to day.”¹⁰⁰ This was a serious blow to Britain whose Foreign Office had envisaged the League as a kind of cooperative organization under Anglo-American tutelage. The League was now fast becoming a liability, yet the establishment of the Court would serve to buttress the League. The U.S. decision did not, of course, prevent the United States from joining the PCIJ, but it was an obvious straw in the wind.

The previous year, Crowe, who was now Permanent Under Secretary (the most senior Foreign Office official), had warned that American past practice with regard to arbitration indicated that the United States could be no more trusted to adhere to the Court than to the League; the United States had always been inclined towards rhetorical flights of fancy about international courts and compulsory arbitration before “blandly explaining that the constitution of America was so peculiar as to require that all the obligations specially binding upon other countries must be modified in favour of the United States.”¹⁰¹ Together with Sir Gordon Hewart, the Attorney-General, he had warned that while an international court would “always present grave risks” to Britain, it should not even be looked at if the United States was not a member since the predominance of continental judges would lead to the growth of differing codes of international law on different sides of the Atlantic.¹⁰²

Crowe now called for an urgent reconsideration of British League policy. “At present,” he wrote, “we are mechanically drifting in our hitherto accepted policy of developing the League in the vague expectation of America coming in.” It was now imperative to avoid any further commitment to the League and, as a first step, to scrutinize the PCIJ. He himself would “do everything possible to delay ratification” of the Statute.¹⁰³ Curzon, the Foreign Secretary, had little interest in the League¹⁰⁴ and declared, after reading “all the papers,” that he was “left completely in doubt as to what is being done or what will be the result and whether we are to acquiesce, expedite or retard.”¹⁰⁵ Consequently, Ronald Campbell¹⁰⁶ provided him with an explanatory minute. The weight of it was in favor of ratification because the Government had given its word to both Houses of Parliament. In reply to a steady stream of questions, it had repeatedly said that arrangements for ratifying the Protocol of Signature of the Statute of the Court were in hand and that it was engaged in consultation

¹⁰⁰ Minute, Oct. 29, 1920, PRO A 8945/1054/45 FO 371/4590, cited in P. Yearwood, *The Foreign Office and the Guarantee of Peace through the League of Nations, 1916–1925*, at 284 (PhD thesis, University of Sussex, 1980).

¹⁰¹ Minute, Oct. 5, 1920, PRO W 512/241/98, *supra* note 27.

¹⁰² Minute by Crowe, Oct. 14, 1920, *supra* note 40; Memorandum by Hewart, Sept. 28, 1920, PRO CP 1905 CAB 24/112.

¹⁰³ Memorandum by Crowe, May 20, 1921, PRO W 5895/22/98 FO 371/7034.

¹⁰⁴ H. NICOLSON, *CURZON: THE LAST PHASE, 1919–25. A STUDY IN POST-WAR DIPLOMACY* 369 (1934).

¹⁰⁵ Minute, May 23, 1921, PRO W 5895/22/98, *supra* note 103.

¹⁰⁶ First Secretary in the Western Department who dealt with League business in the second instance.

with the Dominions.¹⁰⁷ Crowe took Campbell's point but argued that a delaying policy would enable Britain to respond to events and, in particular, to the negative American policy towards the League: "Apart from advertising the League and its clamorous votaries, there is no need to hurry on with the setting up of the international court, and if we can gain another year's time by spinning out consultation with the Dominions and retarding ratification, I think we should do so."¹⁰⁸ Curzon agreed to take the PCIJ to the Cabinet once more, although he himself seems to have thought it a fruitless exercise and that it was too late to alter course. "We are deeply committed," he said, "and public opinion (which is seldom well-informed) undoubtedly favours the setting up of the Court."¹⁰⁹

In due course, the Cabinet confirmed its decision and further decided that the Dominions "be urged to ratify the Convention soon."¹¹⁰ The following day, Curzon told Crowe that they must make use of the presence of the Dominion premiers at the forthcoming Imperial Conference in London¹¹¹ "to press for the ratification of the Permanent Court of International Justice about which I am always having to make speeches in the House of Lords."¹¹²

A few days later, at the League Council's meeting on June 20, H. A. L. Fisher¹¹³ rendered this imperative. As, one after the other, the Council members explained the steps they were taking to deposit their ratifica-

¹⁰⁷ Minute by Ronald Campbell, May 27, 1921, PRO W 5895/22/98, *supra* note 103. See replies to questions from Ormsby Gore, Mar. 23, 1921; Robert Cecil, Mar. 21, Apr. 24 and July 21, 1921; Barnes, June 14, 1921; Sir J. D. Reese, June 14, 1921; Lord Whearsdale, May 10, 1921; and Lord Phillimore, Mar. 16 and June 15, 1921. See also Minute by Cecil Harmsworth (Parliamentary Under Secretary of State at the Foreign Office), Apr. 7, 1921, on an article entitled *Law or Arms* which had appeared in the *Daily News*, and Harmsworth's reply to a parliamentary question on Mar. 30, 1921, PRO W 3478/22/98 FO 371/7034. Other arguments for establishing the PCIJ were that failure to do so would be a severe blow to the League, that the Dominions would probably not follow Britain in such a course and that British public opinion wanted to see the Court set up. On the other hand, and in addition to Crowe's arguments against ratification, there were some "farsighted" people who thought that the burden of the PCIJ on the budget of the League would have an even more deleterious effect than the absence of the United States.

¹⁰⁸ Minute by Crowe, May 28, 1921, PRO W 5895/22/98, *supra* note 103. Crowe believed that it would be possible to delay action for a year, as he was under the misapprehension that June 5 was the cutoff date for depositing ratifications of the Protocol of Signature as well as being the cutoff date for nominating judges. However, the requisite 24 ratifications were so slow in reaching Geneva that both deadlines were extended to the opening of the second Assembly. In July Campbell wryly commented, "The Secretariat General are so desperately anxious to get the Court set up that they are stretching points in every direction." Minute, July 7, 1921, PRO W 7332/22/98 FO 371/7035. See also Memorandum by Spicer, May 12, 1921, PRO W 5169/22/98 FO 371/7034.

¹⁰⁹ Minute, May 28, 1921, PRO W 5895/22/98, *supra* note 103.

¹¹⁰ Minutes of Cabinet meeting, June 14, 1921, PRO CAB 49(21) W 6516/22/98 FO 371/7035.

¹¹¹ See *supra* note 99.

¹¹² Minute, June 15, 1921, PRO W 6443/22/98 FO 371/7035.

¹¹³ Fisher was President of the Board of Education and had been a British delegate to the first (1920) League Assembly.

tions¹¹⁴—and the Italians deposited their ratification with a flourish¹¹⁵—Fisher felt obliged to explain that the reason Britain had not yet deposited its ratification was solely due to its desire to act conjointly with the Dominions. This announcement was naturally “received with the greatest possible gratification” by the other members of the Council.¹¹⁶ The expected ratification by the Canadian Senate was duly received and, with this, the last Dominion’s approval, Britain’s path was clear. On August 4, 1921, the ratifications of Britain, India and the Dominions were deposited with the League Secretariat.

The Years 1922–1924

The political maneuverings that accompanied the election of the judges to the Court at the second Assembly in September 1921 confirmed Britain’s belief that it had been wise in preventing the granting of compulsory jurisdiction to the Court. Hurst reported that the result was “as good as could be expected,” given “the poor list of candidates,”¹¹⁷ but Crowe took a dim view of the prospects for the functioning of the Court. Just as the election of the judges had “proceeded on purely political grounds,” so it was to be expected that “their eventual judgements will always be the result of political considerations, and not of the impartial application of judicial principles.”¹¹⁸ “The story is unedifying and the result bizarre,” concluded Curzon.¹¹⁹ Hurst’s account of the muddled circumstances surrounding the formal opening of the Court in February 1922, and of the extent to which English was not spoken by the judges,¹²⁰

¹¹⁴ The Belgians were about to draft a law for ratification. The Spanish Cabinet was considering the PCIJ and hoped to make an announcement in the next few days. The requisite French law was before the Senate and, although the rapporteur had fallen ill, Poincaré (President of the Committee for Foreign Affairs) had the matter in hand. Hanotaux, the French representative, later announced that the bill had been unanimously approved by the French Senate, that it had been forwarded to the Chamber of Deputies, and that it would immediately be examined by the Committee for Foreign Affairs. The Chinese explained that the copy of the Protocol of Signature which had been dispatched in February had been lost in the post and that another copy had not yet reached Peking. 2 Minutes of the Council, Sess. 13, Minute 392 of 8th (private) meeting, at 25, and Minute 419 of 17th (private) meeting, at 50 (1921). Hudson records the date of China’s deposit of ratification as May 13, 1922. M. HUDSON, *supra* note 9, at 666.

¹¹⁵ 2 Minutes of the Council, Sess. 13, Minute 378 of 5th (private) meeting, at 15 (1921).

¹¹⁶ Note by Mr. Fisher on the Geneva Council meeting, June 29, 1921, PRO CP 3101 W 7190/7190/98 FO 371/7060.

¹¹⁷ Hurst to Crowe, Sept. 15, 1921, PRO W 1008/22/98 FO 371/7036. He wrote:

The Court only contains three men who have judicial experience [a criterion to which the Foreign Office had attached primary importance]. It is made up of three judges, three legal advisers and five professors. I think I can safely prophesy that it will be completely dominated by Lord Finlay and Loder assisted by a vast fund of information which Moore [of the United States] will provide and troubled with a certain amount of obstructiveness from Anzilotti and Huber. I doubt if the rest will count.

¹¹⁸ Minute, Sept. 21, 1921, *id.*

¹¹⁹ Minute, Sept. 22, 1921, *id.*

¹²⁰ Hurst to Crowe, Feb. 15, 1922, PRO W 1743/505/98 FO 371/8319. The majority of judges spoke only French, and Yovanovitch, a deputy judge, knew neither French nor

gave Crowe another occasion to fulminate against the Court: "This whole new Court is the fad of the internationalist and peacemongering busybodies," he noted. "Altogether the prospects of the smooth working of the new institution, and its furthering the cause of justice are not bright."¹²¹ And the Foreign Secretary added that, in his view, "Clearly trouble is brewing."¹²²

It happened that on several occasions over the next few years Britain was a party to proceedings before the Court, but on no occasion did the Foreign Office have cause to recall its earlier apprehensions. There was no debate or consternation about two requests for advisory opinions¹²³ on questions of nationality and the delimitation of frontiers in Eastern Europe.¹²⁴ Britain was party to the first request for a judgment by the Court in the *Wimbledon* case¹²⁵ in 1923, and there were no doubts that recourse to the Court was the best procedure for handling this dispute concerning the interpretation of the peace settlement.¹²⁶ In the *Tunis Nationality Decrees* case of 1923,¹²⁷ Britain was able to make use of the Court to get France to agree to settle the dispute¹²⁸ and, in fact, on this

English. Britain regarded a command of English as important for ensuring that Anglo-Saxon legal thinking would be taken into account by the judges.

¹²¹ Minute by Crowe, Mar. 4, 1922, *id.*

¹²² Minute by Curzon, Mar. 4, 1922, *id.*

¹²³ That is, the request by the Council or the Assembly of the League for the views of the Court on legal questions. After public hearings, the Court deliberated *in camera*. Its opinion was delivered in open court. See M. HUDSON, *supra* note 9, at 483 *et seq.*

¹²⁴ These were the 1923 advisory opinions on the acquisition of Polish nationality and the delimitation of the Polish-Czechoslovakian frontier.

¹²⁵ It arose out of the interpretation of Article 380 of the Treaty of Versailles and resulted from the refusal by the director of the Kiel Canal to allow the passage of the S.S. *Wimbledon* (a British ship chartered by a French company) to deliver armaments to the Polish naval base at Danzig. Britain, Italy and Japan contended that this was in violation of the Treaty of Versailles and, in January 1923, they took it to the Court under Article 386 of the Treaty. The Court found by a majority of eight to three in favor of the applicants.

¹²⁶ See PRO C 9998/1294/18 FO 371/8788; and A. FACHIRI, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE. ITS CONSTITUTION, PROCEDURE AND WORK* 164-75 (1925).

¹²⁷ The dispute arose out of the decrees issued at the end of 1921 in the French Protectorate of Tunis by the Bey (the local ruler) and the French President. Their effect was to confer French nationality on a large number of British, Italian and Greek nationals who were resident in Tunisia. This meant that the British subjects (primarily of Maltese stock) were called up for national service. Those who resisted were imprisoned. In March 1922, the French authorities refused to grant fishing licenses to Maltese fishermen unless, by the ninth of that month, they had accepted French nationality. Foreign Office opinion was unanimous that Britain could not neglect the interests of its subjects and that it was morally and legally sound to maintain that they were British. Minute by Villiers, Head of the Western Department, Jan. 26, 1922, PRO T 911/224/317 FO 372/1844.

¹²⁸ British diplomatic protests were at first ignored by France. See minute by Villiers, Mar. 7, 1922, PRO T 2190/224/317 FO 372/1845; telegram from Lord Hardinge (Ambassador to Paris), Mar. 17, 1922, PRO T 3385/224/317 FO 372/1845. In August France sent a formal reply written in

as uncompromising a tone as all their former notes. It refuses arbitration, refuses reference to the Council of the League, and actually returns to Sir M. Cheetham [British Minister in Paris] the note . . . in which on our instructions he proposed the latter solution while professing to leave open the door to a continued irksome correspondence through the diplomatic channel.

occasion Britain had every reason to be satisfied with the judges since the French judge supported the British contention that the dispute did not involve a question that was solely within French jurisdiction.¹²⁹

However, this favorable experience of the Court does not in any way appear to have affected Britain's policy towards its jurisdiction. On no occasion between 1921 and the end of 1923 was the question of accepting the Optional Clause reconsidered by the British Government. Nonetheless, the clause was not completely dormant in British politics during this period, as the proposal to accept the Optional Clause was raised from time to time within the Labour Party and the unexpected formation of the first Labour Government in January 1924 made it a live issue in British foreign policy. But it was not until the second Labour Government took office in 1929 that Britain brought itself to sign the Optional Clause.

Minute by G. Mounsey (a senior member of the Treaty Department), Aug. 7, 1922, PRO T 9248/224/317 FO 372/1848. Hurst had initially proposed that Britain's best course would be to demand arbitration under the Anglo-French Arbitration Treaty of 1903 and that this procedure would enable either side to back down without losing face. Minute, Jan. 25, 1922, PRO T 911/224/317 FO 372/1844. On second thought, he thought that going to the PCIJ would be cheaper and would enable Britain to act in conjunction with the Greeks and Italians who also had an interest in the matter. Minute, Jan. 27, 1922, *id.* See also PRO T 2188/224/317 FO 372/1844. In April Hurst and Malkin suggested that the dispute be referred to the League Council, which could then refer it to the PCIJ for an advisory opinion. See Minute by F. E. F. Adam (a senior member of the Treaty Department), Apr. 4, 1922, and Minute by Hurst, Apr. 5, 1922, PRO T 3725/224/317 FO 372/1846. The receipt of the French note in August led to a decision to adopt this suggestion. Minutes by Malkin, Aug. 7, 1922; Villiers, Aug. 8, 1922; Tyrrell (Assistant Under Secretary of State, the second most senior Foreign Office official), Aug. 8, 1922; and Curzon, n.d., PRO T 9248/224/317, *supra*. Once Britain placed the dispute on the agenda for the next Council meeting, the French attitude was transformed. Hurst to Mounsey, Sept. 11, 1922, PRO T 11187/224/317 FO 372/1849. Balfour and Bourgeois agreed to resolve the dispute in a friendly manner, but Paris remained sensitive and fearful of giving the appearance of having backed down. Lengthy negotiations requiring all Hurst's diplomatic skills produced agreement with France that the League Council should ask the PCIJ for an advisory opinion under Article 15(8) of the Covenant as to whether the dispute was, as the French contended, solely a matter of domestic jurisdiction. If the Court ruled that it was not a domestic matter, they would submit it to the Court for adjudication. See dispatch from Hurst (Geneva), Sept. 29, 1922, and Minutes thereon by F. E. F. Adam and G. Mounsey, Oct. 4, 1922, and Minute by Crowe, Oct. 6, 1922, PRO T 11444/224/317 FO 372/1849. This procedure was adopted in a joint Anglo-French resolution and the following February the Court gave its opinion that the question of the Nationality Decrees was not a domestic matter. As it happened, it was unnecessary for the Court to go on to consider the merits of the case because the French were willing to come to a satisfactory agreement with Britain that British subjects "up to and including the second generation born in Tunis" were entitled to decline French nationality, as were all British nationals born in Tunis before Nov. 8, 1921 (the date on which the Nationality Decrees were issued).

¹²⁹ Interestingly, the lack of caliber of the judges (from the British point of view) was seen as advantageous to Britain. When Curzon queried the wisdom of taking the Tunis Nationality Decrees to the PCIJ because "[m]y impression of the Court is that the judges are a very scratch lot and that no-one could forecast the result" (Minute, Apr. 7, 1922, PRO T 3725/224/317 FO 372/1846), Malkin reassured him that, although the judges "certainly do not appear a very imposing body," the qualities of Lord Finlay, the British judge, were so far superior to those of his fellow judges "that they were instinctively impelled to follow his lead." This meant, he continued, that the Court was possibly a better bet than had been anticipated a few months earlier. Minute, Apr. 24, 1922, *id.*

U.S.-USSR NUCLEAR ARMS NEGOTIATIONS: THE PROCESS AND THE LAWYER

*By John H. McNeill**

The bilateral negotiating process that has been developed to address the central problems of nuclear arms control has evolved to the point that it can be characterized as a proven mechanism for the negotiation of international agreements on these subjects. Even though the process was recently interrupted, and although it by no means represents the only vehicle available for the purpose, history demonstrates that employment of the methodical bilateral process can lead the way, under favorable political conditions, to the resolution of many of the difficult political and technical questions common to the field of nuclear arms control.

The purpose of this article is to describe the workings of the U.S.-USSR bilateral nuclear arms control process, including the development of the form of the negotiating process, the inner workings of the process, the bureaucratic representation on both sides, the links between the delegations and their capitals, the political foundation of the negotiations and the role of the international lawyer in the process—which has contributed to the progressive development of international law.

I. HISTORICAL BACKGROUND

After several false starts, the United States and the Soviet Union embarked in 1969 on a new method of managing their negotiations on nuclear arms control. This new process was bilateral; as such, it contrasted starkly with previous efforts to control nuclear arms. The only earlier attempt to control these arms on a less than broad, multilateral basis had been the brief trilateral negotiations in Moscow during 1963, which led to the conclusion of the so-called Limited Test Ban Treaty (LTBT).¹ This agreement was reached only after several years of multilateral negotiation on the broader and more difficult subject of a complete nuclear test ban. Although membership in the LTBT regime was later expanded to include more than a hundred governments, the successful negotiating outcome was due in no small measure to the reduction in the number of governments taking part to three—the United States, the United Kingdom and the USSR—with the British in the role of catalyst.² Some 6 years later, the United States and the Soviet Union, as the two major strategic powers,

* Assistant General Counsel, Department of Defense. The author has served as a legal adviser to the U.S. START, INF and SALT delegations. The views expressed in this article are his own, and are not necessarily shared by the Department of Defense or any other department or agency of the U.S. Government.

¹ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, United States-United Kingdom-USSR, 14 UST 1313, TIAS No. 5433, 480 UNTS 43.

² The chief British delegate to the Moscow negotiations used this characterization in his memoirs. LORD HAILSHAM, *THE DOOR WHEREIN I WENT* 219 (1975).

further reduced the number of participants and began their bilateral talks on the limitation of strategic nuclear arms, SALT.

At various times during the 1960s, both the United States and the Soviet Union had advanced proposals aimed at controlling the risk of war through the broader approach of seeking general and complete disarmament (in fact, in 1961 the two sides concurred on a Joint Statement of Agreed Principles for Disarmament Negotiations for this purpose,³ an inevitable by-product of which would have been the limitation and reduction of offensive and defensive strategic nuclear weapons and delivery vehicles). The immediate genesis of the SALT negotiations, however, was the desire of the two countries to demonstrate to the non-nuclear weapon states their willingness to seek an end to the continued quantitative and qualitative development of nuclear weapons in accordance with the Nuclear Non-Proliferation Treaty.⁴ The announcement on July 1, 1968 that the United States and the USSR had reached agreement to commence negotiations on strategic arms limitation was in fact made on the occasion of the signing by both Governments of the Non-Proliferation Treaty.⁵

During the first phase of the SALT negotiations, which lasted from 1969 to 1972, the U.S. and Soviet delegations held a number of lengthy sessions, alternating the venue between Helsinki and Vienna. These SALT I negotiations, in less than 3 years of effort, produced the Treaty on the Limitation of Anti-ballistic Missile Systems (the ABM Treaty),⁶ the Interim Agreement on Certain Measures with respect to the Limitation of Strategic Offensive Arms (the Interim Agreement),⁷ the Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War (the Accidents Agreement)⁸ and the Agreement on Measures to Improve the Direct Communications Link (the Hot Line Upgrade Agreement).⁹

Following these unprecedented achievements, the United States and the Soviet Union proceeded to the second phase of SALT. The political foundation for SALT II had been provided by the 1973 agreement between President Nixon and General Secretary Brezhnev on the Basic Principles of Negotiations on the Further Limitation of Strategic Offensive Arms,¹⁰ and the 1974 accord reached between President Ford and General Secretary Brezhnev at Vladivostok.¹¹ The SALT II negotiations, conducted

³ Report of the United States and the Soviet Union to the 16th General Assembly on the Results of their Bilateral Talks, UN Doc. A/4879 (Sept. 20, 1961), U.S. ARMS CONTROL AND DISARMAMENT AGENCY [hereinafter cited as ACDA], 1961 DOCUMENTS ON DISARMAMENT 439-41.

⁴ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, TIAS No. 6839, 729 UNTS 161.

⁵ ACDA, 1968 DOCUMENTS ON DISARMAMENT 458, 460.

⁶ May 26, 1972, United States-USSR, 23 UST 3435, TIAS No. 7503.

⁷ May 26, 1972, United States-USSR, 23 UST 3462, TIAS No. 7504 (no longer in force).

⁸ Sept. 30, 1971, United States-USSR, 22 UST 1590, TIAS No. 7186.

⁹ Sept. 30, 1971, United States-USSR, 22 UST 1598, TIAS No. 7187, 806 UNTS 402.

¹⁰ June 21, 1973, United States-USSR, 24 UST 1472, TIAS No. 7653.

¹¹ Joint Statement on Strategic Offensive Arms, issued at Vladivostok on Nov. 24, 1974, 71 DEP'T ST. BULL. 879 (1974).

for their virtual entirety in Geneva, endured the vacillations of the eroding East-West relationship for more than 7 years; they culminated in the signing at Vienna on June 18, 1979 of the Treaty on the Limitation of Strategic Offensive Arms.¹² This agreement, in turn, was accompanied by an additional accord between President Carter and General Secretary Brezhnev on the Joint Statement of Principles and Basic Guidelines for Subsequent Negotiations on the Limitation of Strategic Arms, which furnished a political foundation for what was to have been the next phase of the negotiations, SALT III.¹³

Following the decision by President Carter in 1980 to request postponement of Senate consideration of ratification of the SALT II Treaty, and the subsequent decision by President Reagan not to seek its ratification, two new sets of negotiations were instituted: the Strategic Arms Reduction Talks (START), which placed renewed emphasis on reductions rather than limitation of strategic offensive arms, and the Talks on the Limitation and Reduction of Intermediate-Range Nuclear Forces (INF). These two separate negotiations, INF and START, have been conducted in Geneva and are similar in format to the predecessor SALT I and II negotiations.

In recent years, there have been several other bilateral negotiations on arms control between the Soviet Union and the United States based more or less on the SALT model. Such talks include the negotiations on antisatellite weapons convened during 1978-1979 and the trilateral negotiations among the United States, the USSR and the United Kingdom on a comprehensive test ban treaty, which were held in Geneva during 1977-1980. Although both of these efforts failed to yield conclusive results, their conduct was similar in many ways to the negotiating process that evolved during SALT; in certain respects, the trilateral talks also resembled the successful LTBT negotiations.¹⁴

II. THE PROCESS IN GENEVA

Composition of the Delegations

Both the INF and the START negotiations have much in common with the SALT negotiations that preceded them. The special agreements between the negotiating governments and the Swiss Confederation on the diplomatic status, privileges and immunities of the delegations have been remarkably consistent throughout.¹⁵ In size and composition the U.S.

¹² June 18, 1979, United States-USSR (did not enter into force), S. EXEC. DOC. Y, 96th Cong., 1st Sess. (1979).

¹³ *Id.* at 71.

¹⁴ Brief official descriptions of these efforts may be found in S. EXEC. REP. NO. 33, 96th Cong., 2d Sess. 50-52 (1980).

¹⁵ See, e.g., the following U.S.-Swiss agreements: Status, Privileges and Immunities of the Strategic Arms Limitation (SALT) Delegation, Nov. 21 and 22, 1972, 23 UST 3736, TIAS No. 7523; Privileges and Immunities, Theatre Nuclear Forces Delegation, Oct. 17, 1980, TIAS No. 10056; Agreement Establishing Rights, Privileges and Immunities of the Delegation

and Soviet START and INF delegations are also comparable to their predecessors, numbering between 25 and 40 persons per side at any given point.

The two national delegations mirror in institutional representation those bureaucratic interests which in their capitals are concerned with the coordination and formulation of policy regarding nuclear arms and nuclear arms control. In turn, the representatives of these bureaucratic interests all play a role in Geneva. Not surprisingly, the bureaucratic interests represented on each delegation are also comparable to each other. Both have traditionally been led by a civilian with ministerial or ambassadorial rank. On the Soviet side, the delegation leader has always been provided, at least ostensibly, by the Ministry of Foreign Affairs. U.S. delegations have been led by officials of the Arms Control and Disarmament Agency, with the exception of an early phase of the SALT II negotiations when a career official of the State Department served in that capacity.¹⁶

As is to be expected, both sides are characterized by a heavy representation of military interests, including serving officers of various military organizations. In addition, U.S. delegations have always numbered among them representatives of the Secretary of Defense, and the Soviet side has customarily included officials of the Ministry of Defense.

Technically, all members of a U.S. delegation operate directly under the President's authority; but during the many years of SALT negotiations, it became customary for each of the major elements of the Washington bureaucracy to nominate its own representative, who was then endorsed by the White House, and this practice has been followed in START and INF. Thus, included among the principal delegates on the U.S. START and INF teams, usually styled "Members," are representatives of the Department of State, the Office of the Secretary of Defense, the Organization of the Joint Chiefs of Staff and the U.S. Arms Control and Disarmament Agency. In addition, the U.S. SALT delegation for much of its duration had an "at large" member, a private citizen who represented

to the Negotiations concerning Intermediate-Range Nuclear Forces, Nov. 11 and 20, 1981, TIAS No. 10298; Agreement Establishing Rights, Privileges and Immunities of the Delegation to the Negotiations concerning the Limitation and Reduction of Strategic Arms (START), June 9, 1982, TIAS No. 10414.

¹⁶ The first U.S. Chairman (1969-1973) was Ambassador Gerard C. Smith, who served in that capacity for the duration of the SALT I negotiations, when he was also Director of the U.S. Arms Control and Disarmament Agency (ACDA). The second U.S. Chairman (1973-1976) was Ambassador U. Alexis Johnson, a Foreign Service officer with the rank of career Ambassador. The third Chairman (1977-1978) was another Director of ACDA, Ambassador Paul C. Warnke, while the fourth (1978-1979) was Ambassador Ralph Earle II, then Special Representative for Arms Control and Disarmament Negotiations, ACDA. Ambassador Paul H. Nitze has been the Chairman of the U.S. INF delegation since the negotiations commenced in November 1981; in addition, he was recently confirmed as a Special Representative for Arms Control and Disarmament Negotiations, ACDA. Ambassador Edward L. Rowny has been the Chairman of the U.S. START delegation since the beginning of those negotiations in July 1982; he has also served since that date as a Special Representative for Arms Control and Disarmament Negotiations, ACDA.

the public as a whole, rather than any particular governmental agency. This tradition has recently been resumed by the U.S. START delegation.¹⁷

The makeup of the Soviet delegations is somewhat different, but it parallels that of the U.S. delegations and reflects the central involvement of the Foreign Ministry, the Academy of Sciences, the Defense Ministry, including its military services, and—not least—the state security apparatus. There has been no direct Soviet counterpart to the U.S. at-large members, just as there has been no direct U.S. counterpart to the Soviet academicians. Interestingly, for the first time, the USSR Council of Ministers has recently been represented on the Soviet START delegation; the Soviet Academy of Sciences has never been represented on that delegation. Finally, both sides maintain important supporting casts of advisers, including technical experts, interpreters and translators, as well as communicators, archivists and typists. Many of these, both U.S. and Soviet, are long-term veterans of the process.¹⁸

Conduct of the Negotiations

Over the years, a formula has evolved for the conduct of the negotiations in Geneva. Traditionally, the two delegations meet at least once and often twice per week in plenary session. These meetings, which are hosted alternately at the Soviet Mission and at the offices of the U.S. Arms Control and Disarmament Agency in Geneva, are quite formal affairs. They are characterized by the reading of a prepared statement by the Chairman of each side's delegation; such a statement is usually employed as a vehicle for making clear that side's views on a point at issue. Extemporaneous statements are rare. The prepared statements are handed over to the opposite side after presentation, and thus form a part of the *travaux préparatoires*. Since there are no jointly agreed minutes—one of the earliest procedural understandings worked out in SALT I—each side takes its own notes during the proceedings. In the case of plenary statements, however, translations are also exchanged so that each side may retain an official, agreed version of what was actually said, both in English and in Russian. The U.S. records of all such discussions remain classified.

The Dialogue

Following the conclusion of the plenary speeches, the two delegation Chairmen typically retire to a private room, sometimes accompanied by deputies and interpreters, and there further pursue their discussions. The

¹⁷ The distinguished at-large members have been Dr. Harold Brown, later Secretary of Defense; Lt. Gen. George M. Seignious II (ret.), later ACDA Director; and most recently, R. James Woolsey, former Under Secretary of the Navy and member of the President's Commission on Strategic Forces.

¹⁸ For instance, a key member of the U.S. team during SALT II was interpreter Alexis B. Tatistcheff, who not only had served previously as a member of numerous other U.S. delegations in negotiations with the USSR but had been in 1947 the first Russian-language interpreter ever to be appointed by the Department of State.

other participants at the plenary session, usually some ten per side, separate into smaller groups whose composition normally reflects the particular interests and backgrounds of the participants. Military officers, for example, often group together, as do those with a diplomatic background. Members of working groups, which will be described below, usually continue their discussions on these occasions. Such pairing off has sometimes resulted in the establishment of useful channels of communication that can be maintained and developed during the course of one or more negotiating rounds.

These post-plenary discussions, as they are known, generally last for several hours after the conclusion of the speechmaking. The duration in each instance is determined by the length of the conversation between the Chairmen. It is during these post-plenaries that the participants engage in much useful exploration and probing of the political concerns and technical aspects of weaponry reflected in the position of the other side. Such contacts are further developed during the infrequent "social" occasions shared by members of the two delegations. The participants duly report all of these discussions to their respective delegations and capitals.

Working Groups

In addition to the plenary sessions, working groups have been used in the past as a means of negotiating certain aspects of an agreement under discussion. During both SALT I and SALT II, the device of the mini-plenary was occasionally employed to convene small, limited-attendance groups to deal with specific issues, often on the basis of written presentations. In SALT I, small joint technical groups also worked on particular assignments with some notable successes.¹⁹

During SALT II, attempts were made to establish a number of officially mandated working groups on a variety of subjects, but only one actually enhanced the negotiating process in the long term. This was the Drafting Group—sometimes called the "working group" in Russian—which by the end of the SALT II negotiations had lived up to this Russian name by meeting more than three hundred times, often for several hours at a stretch. The mandate of the Drafting Group was to prepare the text of a treaty. By carefully observing the limits of its mandate, and not diverting its energies into areas of basic substantive difference—as agreed between the two delegation Chairmen—this group was able to develop into the principal forum for the elaboration of a treaty text. Thus, its discussions not only could cover points of linguistic difference, but also could explore the technical and political implications of the draft proposals of each side, so long as the Chairmen had agreed that the topic was suitable for discussion by the group.

Whenever the Drafting Group managed to agree on language for the treaty under negotiation, it would do so on an *ad referendum* basis. When

¹⁹ For example, the Hot Line Upgrade Agreement, *supra* note 6, was substantially negotiated in such a group. G. SMITH, *DOUBLETALK* 292–94 (1980).

endorsed by the delegation Chairmen, that text would in turn be regarded as *ad referendum* to governments. In addition to the text of the SALT II Treaty and its Protocol, the group elaborated some 98 subsidiary agreements concerning other obligations and interpretative material, termed "agreed statements" and "common understandings," as well as the Joint Statement of Principles for SALT III and a Memorandum of Understanding regarding the Establishment of a Data Base on the Numbers of Strategic Offensive Arms. In fact, the only text added to the overall agreement without passing through the Drafting Group was the Soviet statement on the Backfire bomber, presented at the Vienna summit after the rest of the agreement had been initialed.

The composition of the Drafting Group reflected the bureaucratic interests represented in the U.S. and Soviet delegations as a whole. Each side's component was led by a senior member of its respective delegation: that of the United States by the State Department's principal delegate, and that of the USSR by his counterpart in the Foreign Ministry.

In addition, a subgroup of the Drafting Group concerned itself with conforming the agreed substantive language to the format and style selected for the treaty itself, and with ensuring that the translations used in the two official-language texts were parallel and accurate. This Conforming Subgroup, as it was known, was also used as a forum for exploring certain policy differences between the sides that were shrouded in differences over form and style. Each side headed its representation in the subgroup with its second-ranking representative in the Drafting Group. For the USSR this was a Foreign Ministry official; for the United States, the legal adviser to the delegation. The record of the subgroup, taken together with the success of the SALT I joint technical working groups, suggests that streamlined working groups with discrete mandates and less than inclusive bureaucratic representation can actually enhance the potential for successful bilateral negotiations in certain circumstances.²⁰

²⁰ In a related example of U.S.-Soviet bilateral negotiations on a military but non-nuclear subject, the delegations to the negotiations on the prevention of incidents on and over the high seas, conducted in 1971 and 1972, did not mirror the bureaucratic interests of their capitals. The U.S. and Soviet delegations were compact (some 12 per side in all) and vertically structured. Whereas the substance of the negotiations concerned all of the military branches to one or another degree, as well as the Arms Control and Disarmament Agency, the U.S. delegation was composed almost entirely of officials of the U.S. Navy and the State Department. Of course, all the concerned organizations were represented in the preparation of the U.S. negotiating position and in backstopping the delegation during the actual negotiations. The U.S. delegation was headed by the Under Secretary, and later, the Secretary of the Navy. The Vice Chairman and principal negotiator was a career State Department official, Ambassador Herbert S. Okun, who later served as Deputy Chairman of several other U.S. nuclear arms delegations. Naval officers constituted the bulk of the delegation, which also included a State Department legal adviser, an interpreter and a note taker. The navy had its own legal adviser on the delegation, which attests to the importance attached to legal advice. In the event, the structure proved to be productive: the Agreement on the Prevention of Incidents on and over the High Seas (23 UST 1168, TIAS No. 7379) was negotiated crisply in two rounds, each of 2 weeks' duration (October 1971 in Moscow, and May 1972 in Washington). It was signed on May 25, 1972 at the Nixon-Brezhnev summit meeting in Moscow, and remains in force.

The principal vehicle for development of the treaty text was the Joint Draft Text (JDT). The subgroup was charged with updating the JDT at somewhat regular intervals. This task was always carried out pursuant to a separate and explicit agreement between the delegation Chairmen. Thus, both sides were aware that the process of updating the JDT involved more than simply recording progress that had been made since the previous edition. They understood that such a process contained its own political dynamic as well. It was necessary to show not only progress, but the maximum progress possible in the circumstances. As a result, pressure grew to resolve drafting questions, outstanding translation differences and even minor technical political differences. Many such matters that had previously appeared intractable were resolved in the context of updating the JDT. It may be that precisely because of their awareness of the positive political significance of making progress on a JDT that the Soviet INF and START delegations have as yet been unwilling to agree to the institution of such a joint effort.

Attempts during the lengthy SALT II negotiations to establish additional joint working parties proved fruitless, which possibly underscores the need to concentrate these efforts in only a few forums that themselves reflect the bureaucratic composition of the delegations as a whole. It appears that the complexities of manning and preparation that would be introduced by a proliferation of such groups would force the decentralization of the decision-making structure. Broad decentralization could pose serious risks to coordinating the work of such groups and exercising effective oversight of their activities. Consistent with this concern, neither the START nor the INF negotiations have set up more than two working groups to date.

Current Negotiations

The procedures followed in Geneva by the START and INF delegations have amply reflected their SALT heritage. In both cases, plenary meetings have been held between the delegations once or twice per week. Thus far, the format of reading prepared speeches followed by post-plenary discussions has been strictly observed. The tradition established by the delegation Chairmen of pursuing their own bilateral, and often exploratory, discussions has also been carried on in both INF and START. Separately convened meetings between these Chairmen have also been held, frequently on short notice at the request of one delegation to offer the other a preview of major new initiatives. Such meetings are also held to emphasize or explore matters of exceptional interest. Indeed, to a significant extent, it appears that the much publicized talks between INF Ambassadors Paul Nitze and Yuli Kvitsinskiy in the Jura were consistent with this tradition.²¹

²¹ According to Amb. Nitze, he and Amb. Kvitsinskiy agreed in July 1982 "to attempt to develop a complete package of reciprocal concessions that, if accepted by both Governments, would resolve all the principal outstanding issues. This would be done without commitment by either Government." Nitze, *The U.S. Negotiator's View of Geneva Talks*, N.Y. Times, Jan. 19, 1984, at A23, col. 1. See also ACDA, TWENTY-THIRD ANNUAL REPORT 24-26 (1984).

The two INF delegations have created a number of working groups under their aegis. Among these is the Treaty Text Working Group, which has met more than 30 times and—should those negotiations resume in their same format—could evolve into a more effective mechanism, perhaps resembling the SALT II Drafting Group. The group has been chaired for the United States by the delegation's senior representative of the Secretary of Defense, while the Soviet component has been led by a Foreign Ministry member of its delegation.

In addition, a second INF working group, dealing with data, has met frequently and has proven to be useful. Its basic mandate was to develop a common approach regarding the methodology to be used to determine the technical capabilities of the weapon systems under discussion in the negotiations. The U.S. team in this group was headed by an Army Brigadier General, the senior representative on the delegation of the Joint Chiefs of Staff, and that of the USSR by a Major General attached to the Ministry of Defense.

In START, a working group on confidence-building measures has already been functioning;²² the U.S. component is headed by the Secretary of Defense's representative on the delegation. It is likely that a working group on treaty language will be established in START should these negotiations resume. To expect that a fully mandated drafting group will function in either case under current circumstances may be overly optimistic since neither of these negotiations yet enjoys the underpinning of a political agreement in principle between the leadership of both sides on the fundamental issues. Such agreements have proven necessary in the past to carry out productive work on the text of a treaty—as, for example, during the SALT II negotiations, after the 1973 Agreement on the Basic Principles of Negotiations was concluded and the results of the Vladivostok summit were endorsed by both President Ford and General Secretary Brezhnev the following year.

In the case of the U.S. delegations in Geneva, the preparation of work follows a pattern that was identified during the early years of SALT I. The entire membership of a U.S. delegation rarely works on a problem en masse. Instead, most advisers usually work in support of the member from their agency, and prepare draft plenary statements that are reviewed by the members together. The advisers are sometimes separately convened to propose solutions to particular problems as well, although in INF the advisers have been brought together to work on problems as a group rather less than in other negotiations. In START and INF, the members of each U.S. delegation have met several times each day, and their work has formed the core of their delegation's efforts. However, the main task of the U.S. delegations today remains basically the same as it has been from the earliest days of SALT I: to interpret and implement guidance from Washington as persuasively as possible at a time best suited to make

²² See *U.S. and Soviet Seek to Prevent a Surprise Attack*, N.Y. Times, Dec. 8, 1983, at A6, col. 1.

it effective, and concomitantly to react in an appropriate and timely fashion to points made by the Soviets.²³

A typical members' meeting is attended not only by the members of the delegation and the Chairman himself, but also by the Executive Secretary of the delegation and the legal adviser. It is largely this core group that is responsible for the ultimate preparation of the speeches to be delivered at the plenary meetings, the guidance for individual members in their post-plenary discussions, the review of guidance for meetings of working groups or subgroups, and the preparation of various communications to be sent back to Washington. The latter include recommendations of courses of action, requests for additional guidance on particular issues, suggestions for further analysis and, of course, reports of meetings with Soviet delegates. During SALT II, Soviet Deputy Foreign Minister Semenov recalled that his SALT I delegation had sent back to Moscow fully ten thousand reports.

III. THE PROCESS IN WASHINGTON

The process in Washington, as was mentioned earlier, is one in which several interested agencies participate. These are, of course, the same agencies that are represented on the delegation itself. Thus, the State Department, the Department of Defense—both the Office of the Secretary of Defense and the Organization of the Joint Chiefs of Staff—and the Arms Control and Disarmament Agency all take part, as well as elements of the U.S. intelligence community. Work in Washington is conducted under the aegis of the National Security Council (NSC).

"Backstopping"

The Washington process is characterized by the need to carry out two separate, major tasks. One of these tasks is "backstopping," that is, the rapid and authoritative response by officials in Washington to requests made by a delegation in Geneva for guidance and other support. To this end, the Washington backstopping committee is called into session, often at very short notice, and its decisions are for all practical purposes subject to the rule of unanimity. That is, if any of the interested agencies taking part in its work disagrees with the conclusion of the group, it becomes necessary for that decision to be made at a higher level. When this occurs, a request is made to a separate NSC-chartered body, currently called the Interagency Group, which is itself a subsidiary of the Senior Interagency Group (SIG), also established by the NSC.

Issues unresolved by the SIG are referred to the National Security Council for decision by the President. (There also exists the Senior Arms Control Policy Group, designed for high-level policy discussion in support of the President and his National Security Adviser.) While the names of the NSC groups have changed over the years as administrations have

²³ G. SMITH, *supra* note 19, at 62.

changed, the basic contours—and the characteristic, multi-tiered nature of this process in Washington—do not fundamentally differ from those of the past.²⁴ In this manner, the instructions to the delegation and its Chairman are formulated and approved by the President and other members of the National Security Council.²⁵

Support

The other essential Washington task is to provide the delegations with studies, analyses and other materials of a supportive nature that will enable those in Geneva to conduct negotiations in a well-informed manner. Because the capabilities of the delegation to conduct such work in depth are sorely limited by the daily demands of the negotiating process, these efforts can usually be carried out most effectively in Washington. Initial requests by a delegation for such support are usually considered by the backstopping committee. One participating agency will be assigned the task of drafting a response, which will in turn be reviewed by the committee as a whole prior to issuance.

Communication with Allies

An associated task is informing U.S. allies about developments in the INF and START negotiations and the policies that will be followed in them by the United States. In addition to private bilateral discussion, the United States has carried out formal meetings on these subjects within NATO, using the forums of the North Atlantic Council and other alliance consultative mechanisms, since the first session of SALT I in 1969.²⁶ On numerous occasions, Chairmen of U.S. delegations have personally briefed the Council on the progress of their negotiations. These briefings have frequently been supplemented by meetings between members of the U.S. delegation and experts from allied capitals. Separate discussions with other allies, such as the Government of Japan, are also conducted by the United States.

These consultations are not simply pro forma but have had on certain occasions a major substantive impact upon the negotiations themselves. For example, during SALT II, the consultations between the United States and its NATO allies in large measure determined the outcome of negotiations on nontransfer and noncircumvention.²⁷ And, of course, the

²⁴ S. TALBOTT, *ENDGAME* 94 (1979); J. NEWHOUSE, *COLD DAWN* 146–48 (1973); G. SMITH, *supra* note 19, at 109–11.

²⁵ *Hearings Before the Senate Comm. on Foreign Relations on the Nomination of Edward L. Rowley of Virginia to be U.S. Special Representative for Arms Control and Disarmament Negotiations with the Rank of Ambassador*, 97th Cong., 1st Sess. 40 (1981).

²⁶ G. SMITH, *supra* note 19, at 77.

²⁷ The United States succeeded in gaining Soviet agreement to the text of Article XII of the SALT II Treaty, which was drafted with the assistance of the NATO allies, to protect existing patterns of cooperation and collaboration within the alliance. On June 29, 1979, the United States provided the text of an interpretive statement on this subject to the North

U.S. position in the INF negotiations has throughout been based upon the NATO "dual track" decision of December 12, 1979. By that decision, the NATO Ministers elected both to pursue INF modernization by deploying Pershing II missiles and ground-launched cruise missiles in NATO Europe and at the same time to seek an arms control agreement based on a step-by-step approach through bilateral negotiations with the Soviet Union "in the SALT III framework,"²⁸ that is, through the negotiating process in Geneva. The views of allied governments may grow to have an increasing impact upon U.S. nuclear arms control policy.²⁹

Congressional Involvement

Another aspect of the Washington process is the role of Congress. Congress has increasingly influenced the formulation of policy for U.S.-USSR bilateral negotiations on nuclear arms control. In addition, during the latter years of the SALT II negotiations, senators and representatives traveled to Geneva as officially appointed advisers to the U.S. delegation and engaged in substantive discussions with members of both delegations; they also attended social gatherings with Soviet delegates, and occasionally—though not in recent years—sat in on plenary meetings and Drafting Group meetings.³⁰ In addition, ample precedent exists for congressional delegations to travel to Moscow to meet with Soviet officials to discuss aspects of the negotiations.³¹

On occasion, Congress has initiated policy recommendations to the President concerning positions to be taken during negotiations.³² Recently,

Atlantic Council; though presented after the Treaty was signed, the statement was considered to be authoritative. This instance evidences the close involvement of NATO in the negotiations, even in the legal sense. See further *Military Implications of the Treaty on the Limitation of Strategic Offensive Arms and Protocol Thereto (SALT II Treaty): Hearings Before the Senate Comm. on Armed Services*, 96th Cong., 1st Sess., pt. 1, at 53-54 (1979).

²⁸ See the Final Communiqué of the Special Meeting of Foreign and Defense Ministers (Brussels), 2 NATO INFORMATION SERVICE, TEXTS OF FINAL COMMUNIQUES 121-23 (1979).

²⁹ The views of the NATO allies on the SALT II Treaty were considered to be of great import by the Senate Foreign Relations Committee during the ratification hearings. Indeed, that body commissioned a special report on the subject: STAFF OF THE SUBCOMM. ON EUROPEAN AFFAIRS OF THE SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG., 1ST SESS., SALT AND THE NATO ALLIES (Comm. Print 1979).

³⁰ This participation may be viewed as a response to complaints from the Senate Foreign Relations Committee that senatorial participation—even at the observer level—was not permitted during SALT I. S. REP. NO. 28, 92d Cong., 2d Sess. 2 (1972).

³¹ For example, a delegation of six senators visited Moscow in August 1979 in preparation for a Senate vote on the ratification of the SALT II Treaty (which vote never occurred). SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG., 1ST SESS., SENATE DELEGATION REPORT ON SALT DISCUSSIONS IN THE SOVIET UNION (Comm. Print 1979).

³² For example, the "Cranston group" was a group of some 25 senators formed in 1978 to monitor the SALT II negotiations; the group made some substantive recommendations to the Carter administration on the agreements. HOUSE COMM. ON FOREIGN AFFAIRS, EXECUTIVE-LEGISLATIVE CONSULTATION ON FOREIGN POLICY, STRENGTHENING THE LEGISLATIVE SIDE, CONGRESS AND FOREIGN POLICY SERIES NO. 5, at 24 (1982). In the broader

several senators and representatives proposed that a new method of reducing strategic offensive arms, known as the "build down" proposal, be put forward in START. The Reagan administration readily adopted the concept. In the opinion of several members of the Senate Foreign Relations Committee, the initiative marked the first time that a major arms control proposal of this kind had been worked out jointly by the executive and legislative branches.³³ This broader aspect of the negotiating process can be expected to grow in importance during the coming years. However, it appears that its greatest impact on the prospects for success in Geneva may come not from the involvement of Congress in developing policy on particular issues but rather from its mandating or otherwise endorsing the broad direction to be taken during the course of the negotiations.³⁴

IV. THE PROCESS IN MOSCOW

Of the negotiating process in the Kremlin, little is known and much speculated. Many branches of the bureaucracy are currently represented on the Soviet delegations, as was noted above, including representatives of the Ministries of Defense and Foreign Affairs, the Council of Ministers, the Academy of Sciences and the organs of state security. Sovietologists differ as to whether—and if so, to what extent—the various political officials negotiate among themselves in Moscow over the Soviet position in Geneva, as do their counterparts in Washington.³⁵ On the basis of the performance of members of the Soviet delegations in Geneva, it would be difficult to maintain that they conduct themselves in a manner other than one consistent with the line taken by the Kremlin.³⁶ Moreover, they uniformly reflect the views of the leadership of their delegation as well. This does not mean, however, that on occasion members of a Soviet delegation would not suggest that bureaucratic divisions in Moscow exist

sense, of course, action and inaction by Congress on defense subjects also has its effects in Geneva; the most famous example is perhaps the narrow approval given by Congress to the U.S. Safeguard ABM program in 1970, discussed by G. SMITH, *supra* note 19, at 148–49. For a less successful example, see S. TALBOTT, *supra* note 24, at 206–09. Also of interest is the recent and briefly successful effort in Congress to condition MX ICBM procurement on a presidential finding that the USSR is acting "in a manner indicating that it is unwilling to take actions to further the control and limitation of types of strategic nuclear missile weapon systems similar to the MX." Dickinson Amendment, passed by the House of Representatives on May 16, 1984, 130 CONG. REC. H3995, H4045–46 (daily ed. May 16, 1984).

³³ S. REP. NO. 277, 98th Cong., 1st Sess. 11 (1983). See also E. ROWNY, START IN A HISTORICAL PERSPECTIVE 3 (U.S. Dep't of State Current Policy Series No. 563, 1984).

³⁴ For example, the Jackson Amendment (sec. 3 of Pub. L. No. 92-448, 86 Stat. 746 (1972)) by which the SALT I Interim Agreement was approved by Congress, has had a lasting effect on U.S. strategic nuclear arms control efforts.

³⁵ An interesting case is made in favor of the thesis that they do so negotiate in C. JÖNSSON, SOVIET BARGAINING BEHAVIOR (1979), where the author documents Soviet internal policy disputes as reflected in the Soviet press. See also J. NEWHOUSE, *supra* note 24, at 54.

³⁶ See G. SMITH, *supra* note 19, at 58. This tendency has been evident for many years. See F. IKLÉ, HOW NATIONS NEGOTIATE 145 (1964).

in order to probe for the "bottom line" of a U.S. position. Certainly, it appears that Soviet delegations do perform the useful task of clarifying U.S. proposals for their leadership in the Kremlin, and sometimes may have proposed modifications to Soviet positions that have enhanced the prospects for agreement. During the SALT II negotiations, for example, Soviet delegates reportedly claimed they had recommended for more than a year before they were finally instructed to do so that the USSR accept the U.S. position that the single-warhead ICBMs deployed at Derazhnya and Pervomaysk be counted as MIRVed missiles.³⁷

Soviet negotiating behavior has been the subject of many studies, and the bilateral U.S.-Soviet nuclear arms control negotiations have apparently yielded few new principles. The predilection of the Soviets for "bazaar tactics" remains steadfast,³⁸ and their preference for working out agreements in principle on particular issues before discussing specific details such as verification arrangements has hallmarked their negotiating style in bilateral nuclear arms control efforts since 1969.³⁹

The seriousness with which Soviet negotiators in Geneva conduct their business can often be gauged by the extent of their public propaganda about it. Although it was agreed early in the INF negotiations that the proposals and positions of one side would not be commented upon publicly by members of the opposite delegation in Geneva, the Soviets have not been particularly scrupulous about observing this rule.

Mention should also be made of the "back channel," an active private channel that enables the two Governments to communicate in a manner wholly separate from both public discussion and the Geneva negotiating process. Such private, high-level means of communication could serve to maximize the potential means of seeking an agreement. However, their use may have been abused in the past, according to veterans of the process such as Ambassador Gerard Smith.⁴⁰ Nevertheless, the alternative of suppressing such communications in favor of strictly limiting contacts to either public exchanges or the Geneva negotiating process would not necessarily enhance the prospects for reaching an agreement.

V. THE ROLE OF THE LAWYER

On the American side, lawyers have played a central role in the negotiating process since its inception. The first American chief negotiator in SALT, Gerard C. Smith, was a distinguished lawyer, as were two of his

³⁷ See further S. TALBOTT, *supra* note 24, at 111-19, 128-30.

³⁸ See, e.g., the views of Fred C. Iklé, as noted in CONGRESSIONAL RESEARCH SERVICE; SOVIET DIPLOMACY AND NEGOTIATING BEHAVIOR, H. DOC. NO. 238, 96th Cong., 1st Sess. 494 (1979).

³⁹ See, e.g., G. SMITH, *supra* note 19, at 283.

⁴⁰ The very title of Ambassador Smith's memoir of the SALT I negotiations reflects his impatience with the use by the negotiating Governments of two separate avenues of communication: the Geneva "front channel" and the "back channel." G. SMITH, *supra* note 19. Smith believes that the collegial approach underlying the delegation's work is the best way to advance U.S. interests in a successful negotiation. *Id.* at 62.

successors, Paul C. Warnke and Ralph Earle II. Many other senior delegates have been lawyers as well. In addition, for the duration of both the SALT I and the SALT II negotiations, the U.S. delegation numbered a legal adviser among its key members, a tradition that harks back to the 1963 Moscow negotiations, when the General Counsel of the Defense Department, John McNaughton, served as legal adviser to the U.S. delegation.⁴¹ Similarly, legal advisers have served both the START and INF delegations of the United States in Geneva.

During the SALT negotiations, the role of the legal adviser expanded so that by the end of SALT II, the legal adviser had become a full member of the team. The legal adviser attended all members' meetings, was instrumental in drafting and negotiating treaty language and served as the deputy of the U.S. Drafting Group component and Cochairman of the Conforming Subgroup. Indeed, as that enterprise drew more and more upon legal theory and practice, by the end of the SALT II negotiations the U.S. legal adviser became the focal point at the working level for the negotiation and completion of the treaty text. The legal advisers on the START and INF delegations of the United States have operated in much the same manner, advising on questions of negotiating tactics and implementation of U.S. policy, as well as on legal and drafting issues.

Perhaps indicative of the fact that the lawyer in American life plays a much more central role than the lawyer in the Soviet Union, the legal representation on Soviet delegations since 1969 has been intermittent and of a different order from that found on the U.S. delegations. The role of the Soviet lawyer has tended to be restricted to draftsmanship and has not reflected a central involvement in the negotiating process.

The complex bureaucratic relationships among the members of the U.S. delegation, and particularly among the principal delegates themselves, serve to complicate the role of the legal adviser. Although the START and INF delegation lawyers are provided to their Geneva teams by one of the Washington agencies involved in the coordination of arms control policy, usually the Arms Control and Disarmament Agency, they must be careful to establish a degree of independence from Washington and from their sponsoring agency in order to serve the delegation effectively. To achieve this goal, the lawyer must also establish a professional relationship based on confidence and trust with all the other members of the delegation, for, in general, only the lawyer is in a position to attend all the meetings of its various elements: members' meetings, advisers' meetings and preparatory meetings for working groups. Thus, the lawyer in whom all have confidence enjoys an unparalleled opportunity to contribute to the success of the delegation's work by providing a point of synthesis for these complex and varied efforts.

Since more than 10 years of this negotiating process have yielded a number of agreements that have contributed to the progressive develop-

⁴¹ See further G. SEABORG, KENNEDY, KHRUSHCHEV, AND THE TEST BAN 235, 252 (1981).

ment of international law and arms control theory,⁴² the legal adviser of the delegation is inevitably the custodian of these precedents and to a significant extent must advise the delegation on questions concerning the effect of maintaining the precedents or departing from them. Accordingly, the potential value to the delegation of a person in such a unique position is great, and so, too, are the concomitant responsibilities.

VI. CONCLUSION

The bilateral U.S.-USSR nuclear arms control negotiating process has proven to be a useful mechanism for working out international agreements to limit and reduce nuclear arms. The complexity of this mechanism reflects both its strengths and its weaknesses. Thus, although it guarantees methodical and thorough consideration of key decisions that bear upon the national security interests of the participating governments, it is too cumbersome to deal rapidly with issues such as those generated by technological development. This complexity appears to be a function of the scope of each particular negotiation: the broader the problems, the more complex the mechanism for dealing with them. To a degree, the products of this mechanism inevitably reflect in their characteristically detailed provisions the effects of this complexity. Solutions so laboriously achieved through the use of this mechanism, however, seem imbued with a reciprocal measure of long-term legal and political authority.

The process has had its failures as well as its successes. It is surely true that sometimes formal negotiations can have the negative effect of actually making it more, not less, difficult to reach agreement on arms control policies, insofar as they inevitably introduce political issues or questions of prestige and legal precedent that could be avoided by other means.⁴³ Nevertheless, the record since 1969 indicates that this process, in which both sides have invested much time and effort, remains the means by which agreements on these highly technical and sensitive subjects can be elaborated, under favorable political conditions, with the greatest chance for success.

⁴² Among the major innovations have been the acknowledgment of the legitimacy of the use of reconnaissance satellites as the normative method available to each side for monitoring the treaty compliance of the other; the establishment of the Standing Consultative Commission, a forum through which each side may ask compliance-related questions of the other without formally charging that a violation of a treaty has taken place; the practice of acknowledging the right of a party to withdraw from an agreement if it decides that extraordinary events relating to the subject matter of the treaty have jeopardized its supreme interests; and the development of "type rules," that is, accounting methods based on legal rules devised to implement numerical limitations on types of armaments.

⁴³ See F. IKLÉ, *supra* note 36, at 5.

SABBATINO RESURRECTED: THE ACT OF STATE DOCTRINE IN THE REVISED RESTATEMENT OF U.S. FOREIGN RELATIONS LAW

By Malvina Halberstam*

I. INTRODUCTION

Among the more controversial provisions of the *Restatement of the Foreign Relations Law of the United States (Revised)*,¹ are the sections dealing with the act of state doctrine in Tentative Draft No. 4.² Section 428 provides: "Subject to §429, courts in the United States will refrain from examining the validity of an act of a foreign state taken in its sovereign capacity within the state's own territory." This provision, of course, is based on the Supreme Court decision in *Sabbatino*.³ The Court there stated, "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government"⁴ even if it is alleged that the taking is contrary to international law.

The Court's decision in *Sabbatino* met with overwhelming⁵—though not

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. The article is based on a paper given at the Annual Meeting of the American Society of International Law in Washington, D.C., in April 1983. The research for the article was supported, in part, by a summer research grant from the Benjamin N. Cardozo School of Law.

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¹ The *Restatement of the Foreign Relations Law of the United States* was adopted by the American Law Institute in 1962 and finally promulgated with revisions in 1965. Work on the *Restatement (Revised)* began in the late 1970s. Thus far, five tentative drafts have been completed and presented to the members of the Institute. The revised *Restatement* as a whole is scheduled to be considered at the May 1985 meeting of the Institute.

² RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §§428 and 429 (Tentative Draft No. 4, 1983) [hereinafter cited as Tentative Draft No. 4]. This draft was considered by the members of the Institute at its 60th Annual Meeting, held in Washington, D.C., May 17–20, 1983. The greater part of the morning of May 19, at which Tentative Draft No. 4 was discussed, was devoted to discussion of these provisions. Other provisions that were subjected to considerable discussion and criticism at previous meetings include Jurisdiction (Tentative Draft No. 2 §§401 and *ff.*, 1981) and Economic Injury to Nationals of Other States and Remedies for Such Injuries (Tentative Draft No. 3 §§712, 713, 1982).

³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁴ *Id.* at 428.

⁵ See, e.g., R. LILlich, THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES (1965); McDougal, *Comments*, 58 ASIL PROC. 48 (1964); Jennings, *Comments*, in

universal⁶—criticism from academicians and practitioners alike and was very quickly overruled by Congress in an amendment to the Foreign Assistance Act.⁷ This amendment, known as the Hickenlooper Amendment, provides, in pertinent part:

[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right [to property] is asserted by any party . . . based upon . . . an act of that state in violation of the principles of international law. . . .⁸

Louis Henkin, the Chief Reporter for the *Restatement (Revised)*, stated at a meeting of the Foreign Lawyers Association in 1967, at which he described himself as “one of the few present who agreed with the Supreme Court decision”:⁹

THE AFTERMATH OF SABBATINO 87 (Tondel ed. 1965); Mann, *The Legal Consequences of Sabbatino*, 51 VA. L. REV. 604 (1965); Kline, *An Examination of the Competence of National Courts to Prescribe and Apply International Law: The Sabbatino Case Revisited*, 1 U.S.F.L. REV. 49 (1966); Laylin, *Holding Invalid Acts Contrary to International Law—A Force toward Compliance*, 58 ASIL PROC., *supra*, at 33.

⁶ See, e.g., Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); Henkin, *Comments*, in *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99, 107 (1964); Cardozo, *Congress versus Sabbatino: Constitutional Considerations*, 4 *id.* at 297 (1966); Metzger, *Act of State Redefined: The Sabbatino Case*, 1964 SUP. CT. REV. 23.

⁷ The Hickenlooper Amendment was first adopted in 1964 as a rider to the Foreign Assistance Act of 1964, Pub. L. No. 88-663, §301(d)(4), 78 Stat. 1013 (1964). As originally adopted, it read:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966.

For Senator Hickenlooper's statement on the purpose of the amendment, see 110 CONG. REC. 19,546, 23,674-82 and App. 5757 (1964).

⁸ Section 620(e)(2) of the Foreign Assistance Act of 1965, Pub. L. No. 89-171, §301(d)(2), 79 Stat. 653, 659, *as amended*, 22 U.S.C. §2370(e)(2) (1982). The bracketed words “to property” were not in the amendment as enacted in 1964. See Foreign Assistance Act of 1964, §301(d)(4), *quoted supra* note 7. See also S. REP. NO. 1188, 88th Cong., 1st Sess., pt. I, at 24 (1964).

⁹ Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 175 (1967).

No case in recent years attracted as much attention, produced as much writing or aroused as much controversy among international lawyers in the United States as did *Banco Nacional de Cuba v. Sabbatino*. The flood of writing subsided and the controversy became largely moot after Congress substantially "repealed" the decision of the Supreme Court by enacting the "Second Hickenlooper Amendment."¹⁰

Andreas Lowenfeld, the associate reporter for the revised *Restatement* who drafted sections 428 and 429, had similarly interpreted the Hickenlooper Amendment as reversing the ruling of the Court in *Sabbatino*. He wrote:

In the *Sabbatino* case the Executive Branch had argued and the Supreme Court had held, that United States courts should not review the official acts of foreign governments affecting property within the foreign state. . . . The majority of the organized Bar had argued, and the Congress has now agreed, that the courts of the United States should review the official acts of foreign governments if these acts affect property beneficially owned by United States citizens and are alleged to be in violation of the principles of international law.¹¹

Nevertheless, section 428 of the revised *Restatement* reasserts the act of state doctrine as set forth in *Sabbatino*.

Section 429, to which section 428 is "subject," provides: "[T]he act of state doctrine will not be applied to claims to *specific property located in the United States* based on the assertion that a foreign state confiscated the property in violation of international law."¹² This exception to the act of state doctrine, intended to take account of the Hickenlooper Amendment, is a very narrow construction of that amendment. The Hickenlooper Amendment is not limited by its terms to specific property located in the United States. It directs the courts "to make a determination on the merits giving effect to the principles of international law" in "a case in which a claim of title or other right to property is asserted by any party."¹³ While some lower courts have limited the Hickenlooper Amendment to property located in the United States,¹⁴ and there is legislative history to support

¹⁰ *Id.* (emphasis added) (footnotes omitted).

¹¹ Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 AJIL 899 (1965) (emphasis added) (footnote omitted).

¹² Tentative Draft No. 4 §429 (emphasis added).

¹³ 22 U.S.C. §2370(e)(2), *supra* note 8 (emphasis added). The amendment as originally adopted did not even include the words "to property," which were added in the 1965 version. See *supra* notes 7 and 8. Although the amendment as currently in effect includes the words "to property," it makes no reference to "specific" property, or to its being "located" in the United States. The property involved in the *Sabbatino* case itself was not in the United States when the action was brought and, indeed, had never been in the United States; only the bills of lading were here. Thus, unless the words "specific property located in the United States" in §429 are interpreted to include not only the actual tangible property that was confiscated, but documents for property, such as bills of lading, as well, the *Restatement* provision would require application of the act of state doctrine to the facts in *Sabbatino*, the very case the Hickenlooper Amendment was designed to reverse.

¹⁴ See, e.g., *Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394 (2d Cir. 1970), vacated and remanded, 400 U.S. 1019, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 405 U.S. 759 (1972); *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46 (1968); *Johansen v. Confederation*

the narrow construction adopted by the *Restatement*, there is also legislative history to the contrary.¹⁵

The broad reassertion of the act of state doctrine in section 428 and the narrow exception provided in section 429 do not reflect that "Congress

Life Ass'n, 312 F.Supp. 1056 (S.D.N.Y. 1970). For a discussion of the Second Circuit decision, summarizing the legislative history and criticizing the opinion, see Note, 11 VA. J. INT'L L. 406 (1971); Lillich, *International Law*, in *Annual Survey of New York Law*, 22 SYRACUSE L. REV. 263, 269-80 (1970-71). See also Note, *A New Approach to the Act of State Doctrine: Turning Exceptions into the Rule*, 8 CORNELL INT'L L.J. 273 (1975). The French decision is discussed and criticized in Note, 11 HARV. INT'L L.J. 212 (1970); Note, *Sabbatino Comes Full Circle: A Reconsideration in Light of Recent Decisions*, 4 N.Y.U. J. INT'L L. & POL. 260 (1971). But see Comment, *Sabbatino Property: A French Twist*, 57 GEO. L.J. 1299 (1969).

It should be noted, however, that while the Second Circuit construes the exception created by the Hickenlooper Amendment narrowly, it does not give the act of state doctrine the broad application provided by §428. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), the court declined to apply the act of state doctrine, stating:

Act of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court. . . . Here, adjudication of the legality of Nigeria's and Central Bank's challenged conduct does not threaten to embarrass the executive branch in its conduct of United States foreign relations, and hence does not seriously implicate the relevant policy considerations. . . . We are not being asked, as the Court was in *Sabbatino*, to judge a foreign government's conduct under ambiguous principles of international law. These are not cases where the challenged governmental conduct is public rather than commercial in nature, . . . or where its purpose was to serve an integral governmental function. . . . Finally, the executive branch has not stated its views in these cases regarding either the propriety of applying the act of state doctrine . . . or the validity of the very governmental act *sub judice*. . . .

Id. at 316 n.38 (citations omitted). See also *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 566 F.Supp. 1440 (S.D.N.Y. 1983); *Razoulzadeh v. Associated Press*, 574 F.Supp. 854 (S.D.N.Y. 1983).

¹⁵ In response to a question by Congressman Fraser, Cecil J. Olmstead, one of the main proponents of the amendment, stated:

[I]f there was a violation of a contract between a U.S. investor and a foreign state and no proceeds or goods or commodity from the enterprise came into the United States, there would never be an opportunity for this amendment to work. There would have to be other ways of seeking redress in that situation. Of course this amendment will only operate when some proceeds of the illegal expropriation turn up in the United States.

The Foreign Assistance Act of 1961: Hearings on H.R. 7750 Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess. 608 (1965) [hereinafter cited as *House Hearings*]. In a written statement submitted to amplify his interpretation of the Hickenlooper Amendment, Olmstead made clear that his view that the amendment would not apply if the property or proceeds thereof could not be found in the United States was based not on an interpretation of the Hickenlooper Amendment itself but on his belief that the doctrine of *sovereign immunity*, as then in effect, would bar the court from exercising jurisdiction. See *House Hearings*, *supra*, at 1306. Mr. Olmstead's statement and insertions for the record are reprinted in *The Foreign Assistance Program: Hearings Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 731-34, 744-46 (1965) [hereinafter cited as *Senate Hearings*]. In a letter to the author, dated Feb. 23, 1984, commenting on an earlier draft of this article, Olmstead stated, "[A]s to the

substantially 'repealed' the decision of the Supreme Court by enacting the 'Second Hickenlooper Amendment,' " as Professor Henkin stated soon after the Hickenlooper Amendment was enacted.¹⁶ Furthermore, in the intervening years, there has been more criticism of the act of state doctrine; the State Department, which had initially urged the rule adopted in *Sabbatino* and opposed the Hickenlooper Amendment, has since then advised the Supreme Court that it would not be opposed to the Court's overruling *Sabbatino*;¹⁷ and four Justices of the Supreme Court have either rejected *Sabbatino* or expressed approval of the "*Bernstein*" exception to the act of state doctrine.¹⁸

Moreover, even the *Sabbatino* Court did not purport to lay down an all-encompassing rule. There is language in the opinion that application of the act of state doctrine would depend on such factors as the extent of

discussion in connection with the hearings on the so-called Hickenlooper Amendment, there was never any intention that the exception be limited to the specific property taken in violation of international law."

Questioning another witness before the committee, Congressman Fraser said:

This gets to the second question, which to my mind is a much more important one. You have assumed throughout the discussion that the only time the *Sabbatino* amendment would have an effect is where a party in this country has acquired some kind of attachment, rights, some kind of jurisdiction in rem that attaches to the property that flows from or is related to the actual taking back in the other country.

I don't read the amendment that way. . . . I read it to mean that if a private party in the United States can acquire jurisdiction in rem against the government of whose acts it complains, then they can go to court seeking to enforce their rights with respect to other property that was confiscated but which has no relationship to property that was attached in order to acquire jurisdiction.

In other words, I don't read this amendment as saying they only can proceed where they actually get their hands on the property that flows from the property confiscated.

House Hearings, supra, at 1029. Congressman Fascell, on the other hand, stated, "It [the amendment] was never intended to apply to any property that doesn't come here." *Id.* at 1027. See also the colloquy between Congressman Fraser and Professor Stanley Metzger in *id.* at 1030. Even Senator Hickenlooper's position on this point is not without ambiguity. Compare 110 CONG. REC. 19,557 (1964) with *id.* at 18,936. For a discussion of the legislative history, see R. LILLICH, *supra* note 5, at 97-113; Lillich, *supra* note 14, at 269-30; *Sabbatino Comes Full Circle, supra* note 14, at 267-69; Note, 11 HARV. INT'L L.J., *supra* note 14, at 218-24; Note, 11 VA. J. INT'L L., *supra* note 14, at 408-16; *Sabbatino Property, supra* note 14, at 1299-1307; Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy—of Errors*, 20 VAND. L. REV. 429 (1966-67).

A substitute amendment, submitted by the State Department, and explicitly limited to cases in which "title [is] asserted to property (or to the proceeds thereof) located in the United States," was not adopted. See *Senate Hearings, supra*, at 728-29. However, the substitute amendment also required an affirmative determination by the Executive that application of the act of state doctrine would "not be consistent with the foreign policy interests of the United States"; moreover, it was received too late for consideration. See *id.* at 728. Thus, Congress's failure to adopt the administration's proposal is not necessarily indicative of a congressional intent to make the amendment applicable to situations in which the property was not in the United States.

¹⁶ See *supra* quote at note 10.

¹⁷ See *infra* note 44 and accompanying text.

¹⁸ See *infra* notes 104-108 and accompanying text.

codification or consensus regarding the international law in the area and the importance of the issue to United States foreign relations. Thus, the Court stated:

[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.¹⁹

The Court concluded by saying that "rather than laying down or reaffirming an inflexible and all-encompassing rule," it was deciding only that United States courts would not consider the validity of a taking of property by a foreign government "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles."²⁰

Considering the separation of powers rationale and the above-quoted qualification of the act of state doctrine, the U.S. Court of Appeals for the Sixth Circuit has held that the act of state doctrine does not apply where the foreign government's act is contrary to a treaty provision;²¹ and the Second Circuit has refused to apply the act of state doctrine when adjudication of the legality of the conduct did "not threaten to embarrass the executive branch in its conduct of United States foreign relations," the court was not being asked "to judge a foreign government's conduct under ambiguous principles of international law," the challenged governmental conduct was "commercial in nature" and the executive branch had not "stated its views . . . regarding . . . the propriety of applying the act of state doctrine."²² The revised *Restatement* contains no such limitations; it does what the Supreme Court refused to do: it lays down "an inflexible and all-encompassing rule."

It is the position of this writer that given the qualifying language in *Sabbatino*, the suggestion by the State Department that *Sabbatino* be overruled and the statement by four Justices currently on the Supreme Court that they would limit or reverse *Sabbatino*, proposed sections 428 and 429 do not properly restate the United States law on the subject.²³

¹⁹ *Sabbatino*, 376 U.S. at 428.

²⁰ *Id.*

²¹ *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984).

²² *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d at 316 n.38, quoted more fully *supra* in note 14.

²³ Professor Henkin has suggested that the arguments in this paper would more appropriately be directed at the act of state doctrine than at the revised *Restatement* provisions, given the Supreme Court's decision in *Sabbatino*. That, of course, raises the question as to whether the *Restatement* should foreshadow changes in the law or merely state what courts have held in the past. Professor Herbert Wechsler, the eminent director of the Institute for over 20 years, has made it clear that in his view the *Restatement* should be more than a formulation of what the courts have held and has vehemently opposed attempts to limit it to merely stating the established law. See Wechsler, *The Course of the Restatements*, 55 A.B.A.J. 147

II. THE ACT OF STATE DOCTRINE

Meaning

The act of state doctrine is not a doctrine of judicial self-restraint or abstention, comparable to the political question doctrine.²⁴ The language of the Court in *Sabbatino* and of section 428 of the *Restatement* is somewhat misleading in that respect. The Supreme Court in *Sabbatino* stated, "we decide only that the Judicial Branch *will not examine the validity* of a taking of property within its own territory by a foreign sovereign government."²⁵ The *Restatement* similarly states that U.S. courts "*will refrain from examining the validity* of an act of a foreign state."²⁶ However, the Court in *Sabbatino* did not dismiss the case, as it does when the case involves a political question. Instead, the Court proceeded to enforce the Cuban decree, notwithstanding that its discriminatory and confiscatory character violated international law and, if enacted by the United States, would be a violation of the due process and taking without just compensation clauses of the Fifth and Fourteenth Amendments to the United States Constitution.²⁷

(1969); Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U.L.J. 185 (1968); Wechsler, *On Freedom and Restraint in the Restatements*, 43 A.L.I. ANNUAL REPORT 5-9 (1966). He said, "[I]f we ask ourselves what courts will do in fact within an area, can we divorce our answers wholly from our view of *what they ought to do*, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?" 55 A.B.A.J. at 149 (emphasis added). He suggested as "a working formula" that "we [the Institute] should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs." *Id.* at 150, adding that he meant "the courts of last resort." *Id.* at 149. In a letter to the author, Professor Wechsler observed:

Institute practice has always viewed the U.S. Supreme Court as a special case . . . and has felt obliged to state Supreme Court doctrine and decisions as they stand, reserving a critique for Comment or Reporters' Notes. Whatever may be thought about the special case, I did not undertake to deal with it in anything I wrote.

I would suggest that even where there is a Supreme Court case in point, if the decision is not recent and has been substantially eroded by the refusal of a majority of the Court to reaffirm the principle in subsequent cases, the black-letter rule should not reassert the principle without qualification. Even viewing the Supreme Court as "a special case," the act of state provisions in §§428 and 429 are unnecessarily rigid, given the limiting language in *Sabbatino* and subsequent Supreme Court decisions, as noted in the introduction and discussed more fully below, and as a number of Institute members pointed out during the discussion of these sections. See 60 A.L.I. PROC. 426-27 (Richard B. Lillich), 428 (Fred. L. Morrison), 428-29 (Monroe Leigh), 434-36 (Cecil J. Olmstead), 440-43 (Mark B. Feldman), 447 (Sigmund Timberg), 449-50 (Peter B. Trooboff) (1983). Urging the inclusion of an exception for human rights violations, Frederick A. Ballard stated: "I think you are hesitating because of the policy of The American Law Institute to just state what the law is. But I would remind you that the Institute has frequently, as our Director has put it, caught the movement of the law. . . ." *Id.* at 437. See also notes 89 and 117 *infra*.

²⁴ See *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

²⁵ 376 U.S. at 428 (emphasis added).

²⁶ Tentative Draft No. 4 §428 (emphasis added).

²⁷ While the U.S. Constitution does not prohibit the taking of private property for a public purpose (see *Hawaii Housing Auth. v. Midkiff*, 104 S.Ct. 2321 (1984)), it prohibits the

Thus, the effect of the Supreme Court decision in *Sabbatino* and of the *Restatement* provisions is to require U.S. courts to enforce a foreign act of state, even if that act is contrary to international law and to the United States Constitution.²⁸ "[N]ot only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; *they must render judgment and thereby validate the lawless act.*"²⁹

As a report on the act of state doctrine by the Committee on International Law of the Association of the Bar of the City of New York emphasized several years prior to the *Sabbatino* decision:

A refusal of courts to consider foreign acts of State in the light of the law of nations is not, it should be remembered, merely a neutral doctrine of abstention. On the contrary the effect of such a doctrine is to lend the full protection of the United States courts, police and governmental agencies to commercial or property transactions which are contrary to the minimum standards of civilized conduct. . . .³⁰

In a statement to the House Foreign Affairs Committee in support of the Hickenlooper Amendment, Myres McDougal, commenting on *Sabbatino*, stated:

The policies applied by the Court, relating to the appropriate allocation of competences among the different branches of our Government, are, in fact, those which underlie the "political questions" doctrine, but the Court did not apply the test for "political questions" which it had so recently announced in *Baker v. Carr* . . . , and it did not find the issue nonjusticiable, as application of the "political questions" doctrine would have required.

Government from doing so without just compensation. The Fifth Amendment provides, "nor shall private property be taken for public use without just compensation." The Court in *Sabbatino* noted that "the possibility of payment" under the system provided for by the Cuban decree "may well be deemed illusory." 376 U.S. at 402.

Clearly, the U.S. Constitution has no application to the conduct of a foreign government outside the United States. It is not clear, however, that the Constitution should have no application when a U.S. court is asked to enforce a foreign state act in the United States, in Justice White's words, "to validate the lawless act." See *infra* text accompanying note 29. It is at least arguable that constitutional limitations should apply in these circumstances. See *infra* notes 71-74 and accompanying text.

²⁸ In this respect, the act of state doctrine goes further than the full faith and credit clause, which has been held not to require one state to enforce the judgment of another state that violates the Constitution. See, e.g., *Thomson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873); *William v. North Carolina II*, 325 U.S. 226 (1945). Cf. Judge Dimock's opinion in *Banco Nacional de Cuba v. Sabbatino*, 193 F.Supp. 375, 381 (S.D.N.Y. 1961) ("Even if we were to suppose a requirement of international law that a state afford full faith and credit to the acts of another state, such a requirement clearly would not extend to an act of state which was in violation of international law").

²⁹ 376 U.S. at 439 (White, J., dissenting) (emphasis added).

³⁰ Committee on International Law, Association of the Bar of the City of New York, A Reconsideration of the Act of State Doctrine in United States Courts 8 (1959). This suggested resolution was adopted with some minor textual changes at the Annual Meeting of the association on May 12, 1959, 1959 Y.B. A.B. CITY N.Y. 276.

The doctrine of automatic, blanket abstention announced by the Court is clearly a new, and bizarre creation.³¹

Rationale

What is the justification for this bizarre doctrine that requires a United States court to direct a United States citizen to turn over property in the United States to a foreign state, pursuant to an act of that state that violates international law and deprives him of his property precisely because he is a citizen of the United States?³² Although the Court in *Sabbatino* cited a number of prior decisions as precedent, its holding was clearly not mandated by those decisions. The cases cited by the Court have been discussed extensively³³ and it is not necessary to repeat the discussion here, other than to note that none of these cases required United States courts to act affirmatively to implement a foreign decree that violated international law and would violate the United States Constitution if enacted by the United States.

The Court gave two reasons for a decision it acknowledged was required neither by international law nor by the Constitution:³⁴ (1) a judicial determination of the validity of a foreign act of state under international law might embarrass the Executive in its conduct of foreign affairs;³⁵ and (2) since the content of the applicable international law in this area was unsettled, it should not be determined by municipal courts.³⁶

Possible Interference in the Executive's Conduct of Foreign Affairs. The argument that a judicial determination of the question would interfere with the Executive's conduct of foreign affairs was also the rationale for the Supreme Court's decision some years earlier, in *Republic of Mexico v. Hoffman*,³⁷ that courts are bound by the Executive's determination to grant or deny a foreign state's claim of sovereign immunity. In an editorial in the *American Journal of International Law*, Philip Jessup criticized that decision as an abdication of the judicial function.³⁸ He said, "It is the

³¹ *House Hearings*, *supra* note 15, at 1037 (citation omitted).

³² Castro's action, nationalizing the property of U.S. citizens in retaliation for the lowering of Cuba's sugar quota by the United States, is by no means an isolated instance of a foreign state's confiscation of a U.S. citizen's property as retaliation against the United States. Muammar Qaddafi, when nationalizing oil holdings of U.S. citizens in Libya, said, "We proclaim loudly that this United States needs to be given a big blow in the Arab area in its cold, insolent face." 13 ILM 767, 770 (1974). For a discussion of the Libyan nationalization, see generally *id.* at 767-82. See also testimony of Henry Schuller at the hearings on the "International Rule of Law Act," *infra* note 62, at 55-61, 88-104.

³³ See, e.g., Justice White's dissent in *Sabbatino*, 376 U.S. at 439 *passim*; Reeves, *The Act of State—Foreign Decisions Cited in The Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 *FORDHAM L. REV.* 599, 618-70 (1964-65); Olmstead, submission in *House Hearings*, *supra* note 15, at 593-96, and *Senate Hearings*, *supra* note 15, at 746-49; Olmstead, testimony in *House Hearings*, *supra* note 15, at 598-600, 1320-24; Henkin, *id.* at 1076-78; Katzenbach, *id.* at 1257-59.

³⁴ 376 U.S. at 423-24, 427.

³⁵ *Id.* at 431-33.

³⁶ *Id.* at 428-30, 434-35.

³⁷ 324 U.S. 30 (1945).

³⁸ Jessup, *Has the Supreme Court Abandoned One of its Functions?*, 40 *AJIL* 168 (1946).

normal process of international affairs to insist that a question of this character must be submitted to the courts and that the diplomatic channel should be utilized only where the courts fail to do justice."³⁹ The Foreign Sovereign Immunities Act of 1976⁴⁰ removed the determination of claims of sovereign immunity from the Executive and vested it in the courts under a restrictive theory of immunity, as set forth in the Act. Numerous cases have been decided by the courts under the Act, without any indication that these decisions have interfered with the Executive's conduct of foreign affairs.⁴¹

Furthermore, the State Department no longer takes the position it took in *Sabbatino*, that a judicial determination of the legality of a foreign act of state under international law would interfere with the Executive's conduct of foreign affairs. It has, in fact, stated that a refusal to consider the legality of foreign acts may be detrimental to the Executive's conduct of foreign affairs. Thus, in *Banco Nacional de Cuba v. First National City Bank*, the Legal Adviser submitted a letter to the Court stating that judicial determination of the legality of the foreign act of state would not interfere in the Executive's conduct of foreign affairs.⁴² In *Alfred Dunhill v. Republic of Cuba*,⁴³ the Legal Adviser wrote a letter to the Solicitor General, included in the Government's brief, inviting the Court to overrule *Sabbatino*. He stated:

[A]t least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts

³⁹ *Id.* at 169. Compare R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER, at xii (1964): "[D]omestic courts must struggle to become their own masters in international law cases. The executive must not be allowed, and must certainly not be invited, to control the outcome of judicial proceedings by alleging the precedence of foreign policy considerations."

⁴⁰ The Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, 28 U.S.C. §§1330, 1332, 1391, 1441, 1602-1611 (1976).

⁴¹ See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978); *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983); *United States v. County of Arlington, Va.*, 702 F.2d 485 (4th Cir. 1983).

⁴² See letter of John R. Stevenson to the Honorable E. Robert Seaver, Clerk of the Court, United States Supreme Court, Nov. 17, 1970, printed as an appendix to *Banco Nacional de Cuba v. First Nat'l City Bank*, 442 F.2d 530 (2d Cir. 1971).

⁴³ 425 U.S. 682 (1976).

under international law, *we would not anticipate embarrassment to the conduct of the foreign policy of the United States.*⁴⁴

The present Legal Adviser, Davis R. Robinson, quoted this language in a letter written for submission to the Court of Appeals for the Sixth Circuit in *Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia*.⁴⁵ Furthermore, in testimony before a subcommittee of the Senate Judiciary Committee, he took a position directly contrary to the Supreme Court's position in *Sabbatino* that a judicial determination of the validity of a foreign act of state under international law might embarrass the Executive in its conduct of foreign affairs. Robinson stated that the "refusal to pass on questions of foreign governmental conduct may actually frustrate important foreign policy objectives."⁴⁶

Adjudication of International Law Questions by U.S. Courts. The other reason given by the Supreme Court for its decision in *Sabbatino* was that United States courts should not decide questions of international law, at least if the relevant international law was controversial.⁴⁷ It was this aspect of *Sabbatino* that evoked the sharpest criticism.⁴⁸ The proposition that international law is part of U.S. law and must be applied by U.S. courts has its origin in the earliest decisions of the Supreme Court. As the Court stated in the oft-quoted language of *Hilton v. Guyot*, "International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation . . . , duly submitted to their determination."⁴⁹ Nor has application of international law by U.S. courts been limited to those rules of international law that are undisputed. In *The Paquete Habana*,⁵⁰ the landmark decision generally cited for the proposition that international law is part of U.S. law, three Justices dissented because they disagreed with the majority's interpretation of the

⁴⁴ Letter from Monroe Leigh, the Legal Adviser, Department of State, printed as Appendix 1 to the plurality opinion of the Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, *id.* at 706, 709, 710-11 (emphasis added).

⁴⁵ See Contemporary Practice, 77 AJIL 142-43 (1983); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984).

⁴⁶ See testimony of Davis R. Robinson in the hearings on the "International Rule of Law Act," *infra* note 62, at 8. He cited the court decisions involving the Libyan nationalization as an example. *Id.*

⁴⁷ 376 U.S. at 427-33.

⁴⁸ See articles cited *supra* note 5; see also Olmstead, *House Hearings*, *supra* note 15, at 576-620, 1305-06, and *Senate Hearings*, *supra* note 15, at 731-34; Jennings, *House Hearings*, *supra* note 15, at 586-89, and *Senate Hearings*, *supra* note 15, at 739-43; Dean, *House Hearings*, *supra* note 15, at 584-86, and *Senate Hearings*, *supra* note 15, at 738-39; Stevenson, *House Hearings*, *supra* note 15, at 581-84, and *Senate Hearings*, *supra* note 15, at 734-39.

⁴⁹ *Hilton v. Guyot*, 159 U.S. 113, 163 (1895), quoted in *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815), in which Chief Justice Marshall stated that "the Court is bound by the law of nations, which is a part of the law of the land."

⁵⁰ 175 U.S. 677 (1900).

applicable international law.⁵¹ They did not suggest, however, that international law should not be applied because it was unclear.⁵²

Municipal courts in the United States and other countries constantly interpret and apply international law.⁵³ Since there are few international tribunals and their jurisdiction is very limited, municipal courts play a major role in the interpretation and development of international law.⁵⁴ Indeed, this *Restatement* provides in another section that in determining whether a rule has been accepted as international law, "substantial weight is to be accorded [to] judgments of municipal courts."⁵⁵

A rule that would preclude municipal courts from deciding whether acts of other states invoked in litigation before these courts comply with international law would be inimical to the development of international law in two respects: first, it would eliminate a major source for the interpretation, application and development of international law; and second, it would help those states that choose to violate international law to do so. Few states have systems of government under which their own courts would invalidate governmental acts on the ground that they violate international law and there is rarely an international tribunal to which the question could be taken. If municipal courts of third countries enforce acts of foreign states regardless of whether they violate international law, there is, in most instances, no court in which the legality of the states' act can be challenged. As Judge Jennings put it:

The prime importance of the domestic jurisdiction in international law cases . . . is that it provides the only considerable area of compulsory judicial determination of public international law issues. The sovereign state of course enjoys immunity from jurisdiction, except insofar as it chooses to waive it, in the international sphere, and to an important extent also in domestic courts. But public international law issues increasingly arise in ordinary civil cases between individuals or corporations in which the state is not in any sense a defendant. In this kind of case the International Court has no jurisdiction at all. The domestic court does commonly have jurisdiction; and its exercise of it is backed by the sanction of the state machinery of enforcement. So quite clearly, we have here a

⁵¹ *Id.* at 715-21 (dissenting opinion of Fuller, C.J., in which Harlan, J., and McKenna, J., concurred).

⁵² *Id. passim.*

⁵³ See, e.g., cases cited *supra* note 49; Mosler, *L'Application du droit international public par les tribunaux nationaux*, 91 RECUEIL DES COURS 619 (1957 I); *Barbuit's Case*, Cases Talb. 280 (1735) ("The law of nations . . . in its fullest extent was and formed part of the law of England . . ."); see also *Triquet and others v. Bath*, 97 Eng. Rep. 936 (K.B. 1764); *West Rand Central Gold Mining Co. v. The King*, [1905] 2 K.B. 391; *The Rapid*, 12 U.S. (8 Cranch) 153, 162 (1814); Memorandum, *Senate Hearings*, *supra* note 15, at 746-49.

⁵⁴ See generally L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 116-67 (1980); W. BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* 77-91 (3d ed. 1971). See also R. FALK, *supra* note 39; McDougal, *Senate Hearings*, *supra* note 15, at 751-76; Memorandum, *Senate Hearings*, *supra* note 15, at 746-49.

⁵⁵ Tentative Draft No. 1 §103(a) (1980).

facet of jurisdiction which is of prime importance to international law and international lawyers.⁵⁶

In the editorial criticizing judicial deference to executive determinations of immunity, already referred to, Judge Jessup said:

Pending the needed fundamental changes in the international legal system which can be made only by multipartite convention, there is more need today than there ever has been before for the coöperation of national courts in contributing to the development of international law. . . . It would be a distinct disservice to the rule of law if it should eventuate that questions of international law should always have to be determined solely by international courts. . . .⁵⁷

He noted, "Chief Justice Marshall pointed out in 1815, that 'the decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.'"⁵⁸

Urging extension of the Hickenlooper Amendment, Professor McDougal stated:

I am writing to urge that last year's amendment . . . or some equivalent be made permanent legislation, thus reestablishing the application of appropriate international law as the long-term policy for all American courts.

. . . . [I]n a world without centralized legislative, executive and judicial institutions most of the decisions about the development and application of international law must continue to be made, as during the past several hundred years, by the officials of particular nation-states. Any suggestion that our courts are not competent to continue to participate in the development and application of an international law, whether related to economic affairs or to other affairs, is fundamentally inimical to our own long-term national interests and the comparable interests which we share with other states.⁵⁹

A report by the Committee on International Law of the Association of the Bar of the City of New York, issued several years prior to the Supreme Court decision in *Sabbatino*, states:

It is the thesis of this report that the role of the act of state doctrine should be more narrowly circumscribed in the United States courts than is presently the case. The courts should not be foreclosed by the rule of judicial abstention from determining the validity under international law of foreign acts of state where the foreign sovereign or his agent is not before the court (or, though before the court, is not entitled to sovereign immunity) and a determination of the validity under international law of the foreign state's act is essential

⁵⁶ Jennings, *The Sabbatino Controversy*, *Senate Hearings*, *supra* note 15, at 739-40, and *House Hearings*, *supra* note 15, at 586-87. Jennings has since been appointed to the International Court of Justice.

⁵⁷ Jessup, *supra* note 38, at 171-72.

⁵⁸ *Id.* at 170.

⁵⁹ *Senate Hearings*, *supra* note 15, at 751-52.

to the determination of the rights of the parties. However clear the respect of the United States courts should be for the official acts of a foreign state, *their concern for the necessity of maintaining minimum standards of international conduct by the enforcement of international law should be paramount.*⁶⁰

The resolution adopted by the committee urged the Department of State to issue a declaration that state and federal courts should "inquire into the validity under international law of acts of foreign states" when relevant to the determination of controversies before them, unless the Department of State notifies the court that doing so would prejudice the conduct of the foreign relations of the United States.⁶¹

Testifying on a bill to eliminate the act of state doctrine,⁶² Davis R. Robinson, the Legal Adviser, said, "When the courts refuse to decide

⁶⁰ Committee on International Law, *supra* note 30, at 4 (emphasis added).

⁶¹ The resolution read:

Whereas it is important both for the redress of individual wrongs and for the realization of the rule of law in international affairs, that United States courts be encouraged to exercise the judicial function of inquiry into the validity under international law of the acts of foreign States when such inquiry is necessary to determine the rights of litigants and will not prejudice the conduct of the foreign relations of the United States;

NOW THEREFORE, BE IT RESOLVED, that The Association of the Bar of the City of New York is of the view that the *United States Department of State should make a public declaration* to the effect that (1) it is the policy of the United States Government that United States courts consider themselves free from any restraint based on deference to the executive branch of Government and the conduct of this country's foreign relations which prevents judicial inquiry into the validity under international law of the acts of foreign States whenever such inquiry is necessary for the determination of controversies within the jurisdiction of such a court and will neither violate recognized principles of sovereign immunity, to the extent such principles may be applicable, nor prejudice the conduct of the foreign relations of the United States; and (2) if the Department of State, after such notice as the court deems reasonable, does not indicate otherwise in a particular case, the absence of such prejudice shall be presumed.

Id. at 15-16 (emphasis added). The signatories to the report and suggested resolution included John R. Stevenson, subsequently Legal Adviser, Richard N. Gardner, Philip C. Jessup, subsequently a judge on the International Court of Justice, Professor Willis L. M. Reese, and Stephen M. Schwebel, currently a judge on the International Court of Justice. Monroe Leigh, who subsequently served as Legal Adviser, and Richard R. Baxter, who subsequently was appointed to the International Court of Justice, also expressed their opposition to the proposition that municipal courts should not decide questions of international law, as did other academicians and practitioners. *See, e.g.,* Griffin, testimony on the "International Rule of Law Act," *infra* note 62, at 62-75; Jennings, *The Sabbatino Controversy, House Hearings, supra* note 15, at 586-91, and *Senate Hearings, supra* note 15, at 739-44; Lillich, testimony on the "International Rule of Law Act," *infra* note 62, at 124-29; Olmstead, *House Hearings, supra* note 15, at 576, and *Senate Hearings, supra* note 15, at 731; Schuller, testimony on the "International Rule of Law Act," *infra* note 62, at 53-61, 88-104; Committee on International Law, *supra* note 30; Wallace, testimony on the "International Rule of Law Act," *infra* note 62, at 22-30. *But see* Cardozo, *supra* note 6; Henkin, *House Hearings, supra* note 15, at 1060-74; Henkin (both references), *supra* note 6; Rabinowitz, testimony on the "International Rule of Law Act," *infra* note 62, at 104-17.

⁶² S. 1434. Designated the "International Rule of Law Act," the bill was introduced by Senators Mathias and Domenici in 1980 and reintroduced in 1982. It provides: "No court

issues of international law properly presented to them, they forego the opportunity to apply international law where it provides an appropriate basis for decision. They also fail to do justice to the parties before them."⁶³ The roster of those who have argued that U.S. courts have an obligation to determine whether foreign acts of state comply with the requirements of international law includes the present and two former U.S. judges on the International Court of Justice and the present and two recent Legal Advisers.⁶⁴

Even Richard Falk, who argues that concepts of sovereignty and respect for divergent social philosophies of government make it inappropriate for one state to apply its view of international law to the acts of another state,⁶⁵ does not advocate that U.S. courts enforce foreign acts of state uncritically. Falk would preclude municipal courts from considering the validity of an act of state under international law only if, in his words, "the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies."⁶⁶ Where, however, the foreign act violates a generally accepted principle of international law, "then domestic courts fulfill their role by refusing to further the policy of the foreign legal system."⁶⁷ Although he criticized the district court's opinion in *Sabbatino*, he agreed that its conclusion that the Cuban decree was invalid was correct insofar as it was based on the ground that the decree was discriminatory. He stated:

The decree was discriminatory, as it expropriated only the property of American nationals. Here, respectable international authority supports the conclusion of invalidity drawn by Judge Dimock. In fact, if the discriminatory facts were used to classify the case in the first instance, then the expropriation no longer falls within the domain of legitimate diversity. This means that objections to substantive review disappear, and an American domestic court would be entitled to refuse the plaintiff recovery. That is, discriminatory economic legislation violates universal standards.⁶⁸

in the United States shall decline on the grounds of the federal act of state doctrine to make a determination on the merits in any case in which the act of state is contrary to international law." *The International Rule of Law Act: Hearings on S. 1434 Before the Subcomm. on Criminal Law of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (1981). Although extensive hearings were held before the Senate Judiciary Committee, no action has yet been taken.

⁶³ Testimony of Davis R. Robinson on the "International Rule of Law Act," *supra* note 62, at 8.

⁶⁴ Judges Jessup, Baxter and Schwebel and Legal Advisers Stevenson, Leigh and Robinson. See *supra* note 61. Sir Robert Jennings, the British judge on the International Court, has also argued that municipal courts have an obligation to decide questions of international law. See *supra* text accompanying note 56. Justice Powell has stated, "Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 774 (1972).

⁶⁵ Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1, 2 (1961).

⁶⁶ *Id.* at 8.

⁶⁷ *Id.*

⁶⁸ *Id.* at 38.

Moreover, he declared that "it is generally agreed and appears to be good policy to allow a domestic court to refuse to enforce foreign confiscatory legislation."⁶⁹ As an illustration of another situation in which it was appropriate for a municipal court to determine whether the foreign state's act violated international law, he cited the *Bernstein* case, not on the ground that the Executive had advised the court that such a determination would not interfere in the conduct of foreign affairs, but because the act of state involved was racially discriminatory.⁷⁰ What Falk is advocating, then, is not that the judiciary be denied the power to determine the validity of acts of state under international law, but that it not apply *international law as interpreted by the West* to issues on which the Soviet Union or the Third World takes a different position. Thus, even Falk does not urge the absolute bar to municipal courts' consideration of the validity of acts of state under international law that proposed section 428 of the revised *Restatement* adopts.

Application of the Due Process and Taking without Just Compensation Clauses. Where the judgment of a U.S. court enforces a foreign confiscatory decree, application of the act of state doctrine may also raise questions under the due process and "taking without just compensation" clauses of the Fifth and Fourteenth Amendments. There are two analytically distinct lines of argument. First, in *Shelley v. Kraemer*,⁷¹ the Court held that state court enforcement of private action constitutes state action. The judiciary is a coordinate branch of the Government and its action, as that of the legislature, constitutes state action. Thus, a judgment giving effect to a private racially restrictive covenant violates the constitutional proscription on discrimination by the state. The Court stated, *inter alia*:

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. . . .

These are not cases . . . in which the States have merely abstained from action. . . .⁷²

Clearly, if Congress enacted a law nationalizing private property without providing compensation, it would violate the due process and "taking without just compensation" clauses of the Fifth and Fourteenth Amendments.⁷³ Applying the reasoning of *Shelley v. Kraemer*, it is arguable that when the federal courts enforce a foreign decree, such enforcement

⁶⁹ *Id.*

⁷⁰ *Id.* at 21-23, 31.

⁷¹ 334 U.S. 1 (1948).

⁷² *Id.* at 14, 19.

⁷³ See, e.g., *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897); *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55 (1937) (invalidating an uncompensated taking); *Berman v. Parker*, 348 U.S. 26 (1954); *Kirby Forest Indus. v. United States*, 104 S.Ct. 2187 (1984).

renders it governmental action, and if that decree nationalizes property without just compensation, it constitutes "state" action by the U.S. Government in violation of the Constitution.⁷⁴

Second, and quite apart from whether U.S. court enforcement of a foreign confiscatory decree is considered "state" action, it is arguable that since the purpose of the act of state doctrine is to further the foreign policy interests of the United States, its application in situations where an individual is compelled to relinquish his private property towards that end, without compensation, violates the "taking without just compensation" clause, particularly where the lawful owner succeeds in obtaining possession of the illegally confiscated property (or other property belonging to the government that has illegally confiscated his property) and he is compelled by a judgment of a U.S. court to return it. It is generally accepted that, in the conduct of foreign affairs, the President may settle or even relinquish claims of U.S. citizens against foreign countries,⁷⁵ the French Spoliation Claims being a famous example of such action.⁷⁶ And, as Professor Henkin has stated, "No one has successfully argued in the Supreme Court that in purporting to dispose of private claims . . . the United States deprived the original claimants of property . . . or appropriated their claims for a public purpose and was obligated to pay them just compensation for any loss."⁷⁷ Nevertheless, it is by no means settled that the Government's relinquishment of private claims to further national interests, without providing compensation, does not violate the due process and "taking without just compensation" clauses of the Fifth Amendment.

In *Dames & Moore v. Regan*,⁷⁸ the Court, sustaining the President's action, stated, "Though we conclude that the President has settled

⁷⁴ While *Shelley v. Kraemer* involved racial discrimination and the equal protection clause, and may therefore be *sui generis*, its rationale would apply equally in this context. Moreover, the fear that a broad reading of *Shelley* would obliterate the distinction between private and governmental action and would, for example, bar the enforcement of state trespass laws against persons excluded from private property on racial grounds (see G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 1002-07 (10th ed. 1980)) has no application in this context.

⁷⁵ See *Dames & Moore v. Regan*, 453 U.S. 654, 675-88 (1981); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262-63 (1972); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983). However, the Supreme Court was careful to limit its holding narrowly even on this point. It said:

We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

453 U.S. at 688.

⁷⁶ The United States relinquished the claims of U.S. citizens against France in exchange for France's forgiveness of a breach of a treaty obligation by the United States. For a discussion of the case, see L. HENKIN, *supra* note 75, at 263.

⁷⁷ *Id.* (footnotes omitted).

⁷⁸ 453 U.S. 654 (1981).

petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States."⁷⁹ Justice Powell, concurring in part and dissenting in part, went further. He said, "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."⁸⁰ While the act of state doctrine does not involve the Government's relinquishing or settling private claims, it does deprive the claimant of a remedy in U.S. courts in order to further foreign policy goals; in cases where the owner of the confiscated property succeeds in regaining the property (or compensation for it), as was the case in *Sabbatino*, and the court forces him to return it to the foreign state, it is a "taking" in the most literal sense of that word. Moreover, the agreement involved in *Dames & Moore* also deprived claimants of their remedy in U.S. courts, rather than settling or relinquishing their claims. Indeed, under the agreement involved in that case, the claimants were provided with an alternate forum in which to pursue their claims. In most instances in which the act of state doctrine is applied to deprive claimants of a remedy (and sometimes the property itself), no alternate forum is available.

III. IMPLEMENTING ANOTHER STATE'S ILLEGAL ACT

Professor Henkin has argued in defense of *Sabbatino*, "[I]nternational law does not tell the United States how to react to Cuban acts that violate international law. The United States is free to condone, acquiesce in, implement, or even applaud them."⁸¹ While I hesitate to disagree with Henkin, I would suggest that international law does not—and certainly should not—permit one state to implement another state's laws that violate international law; that a state's use of its courts and its police to enforce another state's decree that violates international law is itself a violation of international law.

It is a general principle of law, recognized in most legal systems, that one who aids and abets another in violating the law is himself guilty of a violation.⁸² Article 27 of the International Law Commission's draft articles on state responsibility provides: "Aid or assistance by a State to another State, if . . . rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful

⁷⁹ *Id.* at 688–89 n.14.

⁸⁰ *Id.* at 691 (footnote omitted).

⁸¹ Henkin, *supra* note 9, at 181.

⁸² This principle is codified in the criminal law of many states. See, e.g., Colombia Criminal Code (1967), Arts. 196–202; French Criminal Code (1960), Arts. 97, 99, 103–107; German Criminal Code (1961), §§47–49a; Greek Penal Code (1973), Arts. 45–49; Italian Penal Code (1978), Arts. 110–119; Criminal Code of Kenya (1967), §§20–22; Korean Penal Code (1960), Arts. 25, 28, 30–34; Criminal Code of the People's Republic of China (1982), Arts. 19–20, 22–26; Criminal Code of the RSFSR (1972), Arts. 15, 17–19; Turkish Penal Code (1965), Arts. 64–67. See AMERICAN SERIES OF FOREIGN PENAL CODES (1960–).

act. . . ."⁸³ As Professor Mann argued, "[I]f a State commits an international wrong and the court of another State, the forum, refuses recognition to that wrong, the latter does what international law expects it to do and what it must do *in order not to become an accessory to the delinquency*."⁸⁴

In the United States, judicial enforcement of a private act renders the conduct "state action," and if discriminatory, a violation of the Constitution. Thus, as noted above, the U.S. Supreme Court held that when a state's court enforces a private discriminatory contract, the state is itself guilty of discrimination.⁸⁵ Similarly, the Court has stated that by admitting illegally obtained evidence, the courts would be participating in the illegality.⁸⁶

Even Henkin apparently would not extend his argument that a state "is free to condone, acquiesce in, implement, or even applaud"⁸⁷ another state's law to violations of the international law of human rights. The Reporters' Notes to section 428 state that "[a] claim arising out of an alleged violation of human rights—for instance a claim by the victim of torture or genocide—would . . . probably not be defeated by the act of state defense since the accepted international law of human rights contem-

⁸³ Draft articles on state responsibility, Art. 27, [1978] 2 Y.B. INT'L L. COMM'N, pt. 2, at 78, 99, UN Doc. A/CN.4/SER.A/1978/Add.1/pt.2. Indeed, it is arguable that even under the revised *Restatement* a state is not free to implement an illegal act of another state. Section 711, State Responsibility for Injury to Nationals of Other States, provides:

A state is responsible to another state for injury to a national of the latter state resulting from an official act or omission that violates

- (a) an internationally recognized human right;
- (b) any other personal right or interest of individuals of foreign nationality that is protected by international law; or
- (c) rights to property or other economic interests of persons, natural or juridical, of foreign nationality that are protected by international law, as provided in §712.

Tentative Draft No. 3 (1982).

⁸⁴ Mann, *International Delinquencies before Municipal Courts*, 70 LAW Q. REV. 181, 198 (1954) (emphasis added). Cf. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 220-32 (1982-83) (arguing that foreign state officials who engage in terrorist acts in violation of international law are not entitled to immunity from prosecution in the United States). He states:

If, for example, a foreign government or official violated international law and one of our courts recognized a claim to immunity, the court's decision would have the undesirable effect of supporting illegality. The judiciary's commitment to law would be compromised and its decision to tolerate illegality would be functionally the same as though the court had been an accomplice of the offending government.

Id. at 227.

⁸⁵ *Shelley v. Kraemer*, 334 U.S. 1 (1948). See *supra* text accompanying notes 71-74.

⁸⁶ See, e.g., *McNabb v. United States*, 318 U.S. 332, 345 (1943) ("a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law") (emphasis added); *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968) ("The rule also serves another vital function—the imperative of judicial integrity") (citing *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

⁸⁷ See *supra* text at note 81.

plates external scrutiny of such acts.”⁸⁸ While the reporters are to be commended for at least including a caveat on human rights, this caveat is problematic in several respects. First, it is only a sentence in the Reporters’ Notes, not a qualification of the black-letter rule.⁸⁹ Second, even this sentence in the Reporters’ Notes does not categorically reject application of the act of state doctrine to human rights violations. It states only that a claim arising out of such violations would “*probably* not be defeated by the act of state defense.”⁹⁰ Third, it gives as the reason for the distinction between human rights and other rules of international law that international law “contemplates external scrutiny of such acts.”⁹¹ Clearly, international law also contemplates external scrutiny of other acts that violate international law.⁹² Indeed, it is only relatively recently that the proposition that the protection of individual rights is a legitimate subject of international law has gained acceptance.⁹³ International scrutiny of a state’s confiscation of property belonging to aliens is far older.⁹⁴

⁸⁸ Tentative Draft No. 4 §428 Reporters’ Note 4.

⁸⁹ Several members of the Institute urged qualification of the black-letter rule to indicate that the act of state doctrine does not apply to human rights violations. *See, e.g.*, comments by Sigmund Timberg, 60 A.L.I. PROC. 423 (1983), and Richard B. Lillich, *id.* at 426–27. *See generally id.* at 423–30, 437–39, 447–48. Finally, Bennett Boskey suggested as a compromise that the sentence concerning human rights quoted above (*see* text at note 88 *supra*) be moved from the Reporters’ Notes to the Comment and Professor Henkin agreed to do so. *Id.* at 452–55.

⁹⁰ Tentative Draft No. 4 §428 Reporters’ Note 4 (emphasis added). While the court in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), did not rule on the applicability of the act of state doctrine since the defense had not been raised below, it nevertheless noted “in passing” its doubt as to “whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation’s government, could properly be characterized as an act of state.” *Id.* at 889. Given the tenor of the opinion and the extensive discussion of human rights under international law, it is probable that had the court believed it to be so, it would have also “noted in passing” that the act of state doctrine does not apply to human rights violations.

⁹¹ Tentative Draft No. 4 §428 Reporters’ Note 4.

⁹² *E.g.*, treaty violations, *see* Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 28 UST 1977, TIAS No. 8532 (1977); treatment of aliens, *see* authorities cited *infra* note 94.

⁹³ Compare 1 L. OPPENHEIM, INTERNATIONAL LAW (1912), “States only and exclusively are subjects of the Law of Nations” with Lauterpacht’s edition of 1 OPPENHEIM (1955), that one can “no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law. . . . [T]here must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law,” quoted in L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1, 6 (1973). *See also* Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 19 (1982). “[A] State’s own citizens were almost completely at its mercy, and international law had little to say about mistreatment of persons by their own government.”

⁹⁴ *See, e.g.*, *West Rand Central Gold Mining Co. v. The Kings*, [1905] 2 K.B. 391; *Chorzów Factory case*, 1928 PCIJ, ser. A, No. 17, 1 WORLD CT. REP. 646; 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655–65 (1942); U.S. Dep’t of State, 19 Press Releases 50, 136, 139, 165 (1938) (United States-Mexico discussions on expropriations); *see generally* 2 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 900–29, 1385–1413 (1937). *See also* Comment,

IV. THE HOUSE OF LORDS DECISION IN
BUTTES GAS AND OIL CO. v. HAMMER

Much has been written about the extent to which decisions in other states are consistent with or inconsistent with the position taken by the U.S. Supreme Court in *Sabbatino*.⁹⁵ I will not engage in an analysis of the foreign cases here, other than to note that in none of those cases has a court of one state required a citizen of that state to turn over property in his possession to the government of another state, pursuant to an act of the latter state that deprived him of that property as retaliation against his government in violation of international law. I do, however, wish to discuss the decision of the House of Lords in *Buttes Gas & Oil Co. v. Hammer*,⁹⁶ since it is cited in the Reporters' Notes to the *Restatement* as a basis for the proposition that the House of Lords decided "to adopt the American view of the act of state doctrine."⁹⁷ This, I believe, is not entirely correct.

While the *Buttes* opinion does rely on act of state and cites the Supreme Court decision in *Sabbatino*, the case differs from *Sabbatino* and section 428 of the *Restatement* in two significant respects. First, the act in question was not a discriminatory confiscation of property of a British citizen, intended as an act of retaliation against his Government. It was an agreement between Iran and two emirates, "adjacent independent sovereign states in the Arabian Gulf, whose foreign relations were controlled by the United Kingdom government under treaty,"⁹⁸ entered into with the approval of Great Britain, settling a dispute among them over territorial sea rights off their respective coasts. United States courts have long deferred to the Executive in matters involving disputed claims of sovereignty over territory, quite apart from the act of state doctrine. In *Williams v. Suffolk Insurance Co.*,⁹⁹ for example, decided in 1839, the Supreme Court held that the plaintiff was entitled to insurance compensation for its ship seized by Argentina off the Falkland Islands, even though the Government

The Act of State Doctrine—Its Relation to Private and Public International Law, 62 COLUM. L. REV. 1278, 1297–1302 (1962). For international arbitration awards regarding international scrutiny of confiscation of alien property, see, e.g., Marguerite de Joly de Sabla (U.S. v. Pan.), American and Panamanian General Claims Arbitration 432, 447, 6 R. Int'l Arb. Awards 358, 366 (1933) ("acts of a government in depriving an alien of his property without compensation impose international responsibility"); accord Norwegian Shipowners' Claims (Nor. v. U.S.), Hague Ct. Rep. 2d (Scott) 36, 69, 1 R. Int'l Arb. Awards 307, 334 (Perm. Ct. Arb. 1922).

⁹⁵ For the position that other states do not have a similar rule, see Justice White's dissent in *Sabbatino*, 376 U.S. at 439–41, 446; the testimony of Cecil Olmstead in the hearings on the Hickenlooper Amendment, *Senate Hearings*, *supra* note 15, at 743–44, 746–49, and *House Hearings*, *supra* note 15, at 590–91, 593–96. For the position that other states do have a similar rule, see Reeves, *supra* note 15, at 541–63; Reeves, *supra* note 33.

⁹⁶ [1981] 3 All E.R. 616, [1981] 3 W.L.R. 787. For a discussion of the act of state doctrine in England, criticizing its extension in *Buttes*, see Jones, *Act of Foreign State in English Law: The Ghost Goes East*, 22 VA. J. INT'L L. 433 (1982).

⁹⁷ Tentative Draft No. 4 §428 Reporters' Note 11.

⁹⁸ *Buttes*, [1981] 3 All E.R. at 616.

⁹⁹ 38 U.S. (13 Pet.) 415 (1839).

of Argentina had warned that it would seize ships entering without prior authorization. The Court based its ruling on the ground that the Executive had recognized British, not Argentinian, claims to sovereignty over the Falkland Islands. More recently, the Court of Appeals for the Fifth Circuit, dismissing an action for conversion arising out of the same controversy as *Buttes*, stated: "The issue of sovereignty over disputed territory is a political question reserved to the executive branch."¹⁰⁰

Second, the House of Lords characterized the act of state doctrine as one of "judicial restraint or abstention,"¹⁰¹ and dismissed not only Occidental's counterclaim, which challenged the validity of the foreign act of state, but also Buttes's initial action for slander, which denied that the act violated international law. Lord Wilberforce stated, "To allow Buttes to proceed but to deny Occidental the opportunity to justify, would seem unjust. . . ."¹⁰² Thus, although the Court did not adjudicate the validity of the act of another sovereign, it also did not permit a party to rely upon the validity of the act to secure relief from the Court.¹⁰³ In *Sabbatino*, by contrast, the Court enforced the illegal Cuban action. For *Buttes* to reach the same result as *Sabbatino*, the House of Lords would have had to render judgment for Buttes in the slander action. This the House of Lords expressly refused to do.

V. THE POSITION OF THE SUPREME COURT SINCE *SABBATINO*

While the Supreme Court has not overruled *Sabbatino*, four of the Justices currently on the Court have either explicitly rejected it or adopted the *Bernstein* exception.¹⁰⁴ Justice White, of course, rejected the Court's position in *Sabbatino* in his dissenting opinion in that case.¹⁰⁵ Justice Powell, concurring in *First National City Bank*, stated, "I believe that the broad holding of *Sabbatino* was not compelled by the principles, as expressed

¹⁰⁰ Occidental of Umm al Qaywayn v. A Certain Cargo, 577 F.2d 1196, 1204 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979). A letter from the Legal Adviser, included in the Government's amicus curiae brief, stated, in part:

It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.

We do not believe that this judicial self-restraint should turn on . . . the so-called Act of State doctrine. . . . It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties.

577 F.2d at 1204 n.13. For a discussion of that case, see Insley & Woolridge, *The Buttes Case: The Final Chapter in the Litigation*, 32 INT'L & COMP. L.Q. 62 (1983).

¹⁰¹ [1981] 3 All E.R. at 630. A British commentator stated that "Lord Wilberforce was invoking and applying a notion of non-justiciability akin to the U.S. political question doctrine." Jones, *supra* note 96, at 466. Compare Occidental of Umm al Qaywayn, 577 F.2d 1196 (5th Cir. 1978).

¹⁰² [1981] 3 All E.R. at 633.

¹⁰³ *Id.*

¹⁰⁴ Chief Justice Burger and Justices White, Rehnquist and Powell.

¹⁰⁵ 376 U.S. at 439-72.

therein, which underlie the act of state doctrine. . . . Had I been a member of the *Sabbatino* Court, I probably would have joined the dissenting opinion of MR. JUSTICE WHITE."¹⁰⁶ Echoing the argument of Judge Jessup that judicial deference to the Executive constitutes an abdication of the judicial function, Justice Powell said:

I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process.

Nor do I think the doctrine of separation of powers dictates such an abdication. . . . Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law.¹⁰⁷

Justice Rehnquist, in an opinion joined in by Chief Justice Burger and Justice White, delivered the judgment of the Court. He wrote:

We conclude that where the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine.¹⁰⁸

Thus, the rule proposed in sections 428 and 429 of the *Restatement* ignores the expressly stated position of four Justices now on the Supreme Court. As Justice Rehnquist stated in another context, "While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue."¹⁰⁹

VI. CONCLUSION

In sum, given the storm of protest that *Sabbatino* evoked from the academic community and the practicing bar,¹¹⁰ the swift reversal of its specific holding by Congress in the Hickenlooper Amendment,¹¹¹ the suggestion in the Government's brief in *Dunhill* that *Sabbatino* be overruled,¹¹² the explicit rejection of *Sabbatino* by four of the Justices now sitting on the Supreme Court¹¹³ and the testimony by the present Legal Adviser that the refusal to pass on foreign governmental conduct may actually frustrate important foreign policy objectives,¹¹⁴ I think sections 428 and 429 of the *Restatement* do not accurately reflect the law as it is

¹⁰⁶ First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 774 (1972).

¹⁰⁷ *Id.* at 774-75.

¹⁰⁸ *Id.* at 768.

¹⁰⁹ Texas v. Brown, 103 S.Ct. 1535, 1540 (1983).

¹¹⁰ See *supra* notes 5 and 48 and accompanying text.

¹¹¹ See *supra* notes 7 and 8.

¹¹² See *supra* note 44 and accompanying text.

¹¹³ See *supra* text at notes 104-108.

¹¹⁴ See *supra* quote at note 46.

evolving on this subject.¹¹⁵ For the reasons stated above, I believe it would not be inappropriate for the *Restatement* to adopt a position (similar to that urged by the Association of the Bar of the City of New York¹¹⁶) that when a judicial decision of the issue is not inconsistent with the political question doctrine, a court should not decline to determine the validity under international law of an act of state invoked by one of the parties in litigation before it,¹¹⁷ at least if the Executive gives no indication that such a determination would be detrimental to the conduct of foreign affairs.¹¹⁸ The application of the political question doctrine to those cases to which it is applicable under the criteria set forth in *Baker v. Carr*,¹¹⁹ together with a provision that would preclude or render highly unlikely judicial consideration of the foreign acts' compliance with international law when the Executive advises the court that its determination of that question would be harmful to U.S. foreign relations, should suffice to safeguard the primacy of the Executive in the conduct of foreign affairs.

¹¹⁵ Following statements by several members of the Institute, urging greater flexibility, Professor Henkin agreed to insert the word "generally" or "ordinarily" in §428 and to modify the comments somewhat. Even as modified, the proposed provision would not take sufficient cognizance of the caveats in *Sabbatino* and of the subsequent developments. As Mark Feldman stated:

[S]ince the *Sabbatino* decision . . . there has not been any decision of the Supreme Court . . . and there has not been any position by the United States Congress or by the Executive Branch supportive of the act of state doctrine in the expropriation context. . . . [I]n every case the Court has put together a majority against the application of the act of state doctrine.

60 A.L.I. PROC. 440-41 (1983). For a discussion of the role of the *Restatement*, see *supra* note 23.

¹¹⁶ For the text of the proposed resolution, see *supra* note 61.

¹¹⁷ Whether U.S. antitrust laws or foreign laws should apply to conduct abroad that has an effect on trade in the United States involves complex and controversial questions of law and policy beyond the scope of this article. For the approach suggested by the *Restatement*, see Tentative Draft No. 2 §§403, 415. See also Tentative Draft No. 3 §419. For a summary of the U.S. cases on point, see §415 Reporters' Note 2. It should be noted, however, that a rejection of the act of state doctrine would not necessarily deprive those who engage in conduct abroad that is either permitted or required by the foreign law but a violation of U.S. law of the protection of the foreign law, which is now sometimes invoked under the act of state doctrine. The act of state doctrine as applied in *Sabbatino* and as set forth in §428 requires U.S. courts to enforce the foreign act in those cases to which it applies *without considering its validity under international law*. Rejection of this doctrine would permit the courts to consider the validity of the foreign act under international law. But if the foreign act does not violate international law, it would still be applied to those cases to which it is otherwise applicable. Since both the U.S. laws that prohibit restraint of trade and the laws of other countries that permit or in some instances require conduct that results in limiting competition are valid under international law, adoption of the approach suggested by the New York City Bar Association (see *supra* notes 60-61 and accompanying text) or by the Mathias bill (see *supra* note 62) would not preclude application of the foreign law.

¹¹⁸ Whether the courts should be foreclosed from making such a determination by an executive decision that a judicial determination would be detrimental to U.S. foreign relations raises complex questions concerning the appropriate role of the courts in our constitutional system. Judge Jessup and Justice Powell have taken the position that even in those circumstances, automatic deference by the courts to the Executive is an abdication of the judicial function. See *supra* notes 38 and 107 and accompanying text.

¹¹⁹ 369 U.S. 186 (1962). See also *Occidental of Umm al Qaywayn v. A Certain Cargo*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

WHAT DOES TEL-OREN TELL LAWYERS? JUDGE BORK'S CONCEPT OF THE LAW OF NATIONS IS SERIOUSLY MISTAKEN

A recent decision of the Court of Appeals for the District of Columbia Circuit, *Tel-Oren v. Libyan Arab Republic*,¹ is sparking considerable controversy and will undoubtedly be examined at length in law journals. The events in issue occurred March 8, 1978, when 13 heavily armed members of the Palestine Liberation Organization left Lebanon for Israel under instructions to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israel. On the main highway between Haifa and Tel Aviv, they stopped and seized a civilian bus, a taxi, a passing car, and later a second civilian bus, taking the passengers hostage. While proceeding toward Tel Aviv with their hostages gathered in the first bus, the terrorists fired on and killed numerous occupants of passing cars as well as some of their own passengers. They also tortured some of their hostages. At a shoot-out with the police at a police barricade, the terrorists shot more of their hostages and then blew up the bus with grenades. As a result of the terrorists' actions, 22 adults and 12 children were killed, and 63 adults and 14 children were seriously wounded.

The plaintiffs in *Tel-Oren* are most of those wounded and the survivors of most of those killed, as well as guardians and next friends of the wounded minors. Some of the plaintiffs are citizens of the United States, some of the Netherlands, and some of Israel. They brought suit in the United States against the PLO, the Libyan Arab Republic, the Palestine Information Office, the National Association of Arab Americans and the Palestine Congress of North America. The district court dismissed their action for lack of subject matter jurisdiction and as barred by the applicable statute of limitations. The court of appeals affirmed the dismissal in a brief per curiam opinion, but then appended three separate concurring opinions of Judges Edwards, Bork and Robb, comprising a total of over 50 pages. The judges agreed on very little other than the result, and thus the case is already on its face sharply controversial.

Because Judge Bork's opinion is the most detailed and perhaps the most scholarly, or at least may appear to be so, and because lengthy treatments of the *Tel-Oren* case will soon be appearing, I want to confine my essay here to that opinion, and in particular, Judge Bork's view of international law.

Before addressing Judge Bork's reasoning, however, I want to take brief issue with those persons who feel that it was a severe mistake for the

¹ 726 F.2d 774 (D.C. Cir. 1984). A panel discussion devoted to the *Tel-Oren* case is scheduled for the 1985 Annual Meeting of the American Society of International Law.

plaintiffs to bring their case in a United States court in the first place. Many readers of the opinion have told me informally that the case is a major setback to the cause of human rights enforcement in American courts. The notion of suing foreign states and organizations on a tort that occurred outside the United States seemed, to these observers, to be asking for trouble. If the plaintiffs had not sought redress in U.S. courts, these persons say, the circuit court would not have had the occasion to hand down what may turn out to be a regressive opinion endangering the human rights cause in cases that have a more legitimate claim to jurisdiction in those courts. This may be doubly true if the Supreme Court gets the case and affirms it on the reasoning advanced by Judge Bork.

On a superficial reading, it is quite clear that a terrorist attack perpetrated by the PLO in Israel is not something over which U.S. courts have or should have jurisdiction. Let the victims seek redress elsewhere, whether in Libya, Israel or some other country having close ties to the incident or to the victims. Why stretch American jurisdiction to cover such a case? Such arguments, I submit, depict a traditional resistance to the very concept of human rights in international law. If human rights means anything in international law, it means that traditional state-based jurisdictional exclusivities must give way to a more fundamental realization that the rights of people count for more than the rights of states. I tried to give this perspective an operational meaning in a previous article, in which I argued that the 19th-century notion of nationality as a basis for a state's espousal of a national's claim should be reinterpreted under the human rights law of the 20th century by substituting internationality for nationality.² Specifically, the United States itself has a real interest in seeing to it that nationals of other countries are not the victims of terrorism or genocide perpetrated by their own governments or by other entities in foreign lands.³ The new law of human rights, in short, calls for a change in world view. The interest that a country has in its nationals is expanded, under the law of human rights, to include an interest in non-nationals, especially where basic human rights are threatened.

Let us look at the real basis for the claims by the *Tel-Oren* plaintiffs. Concretely, they were suing in the United States for a sum of money—representing assets owned by the PLO. The action was for money damages against the PLO (for the moment, I omit the other defendants). What the plaintiffs, under my theory, were saying is that the money and other assets owned by the PLO in the United States are already under the general jurisdiction of the United States, and yet the ownership of these assets more properly belongs to the plaintiffs as compensation for the terrorist attack sponsored by the PLO than it belongs to the PLO. Under this view, if the United States wants to allow the PLO to have bank accounts and assets in the United States, it should condition this allowance on the

² D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1123-26 (1982).

³ *Id.* at 1114-15, 1147-49.

nonviolation by the PLO anywhere in the world of basic human rights. If plaintiffs such as the ones in *Tel-Oren* can show that they were the victims of a fundamental violation of human rights by the defendant PLO, then the United States should not continue to protect the assets of the PLO in this country against the claims for compensation by such plaintiffs. Or to put the matter a different way, the court of appeals, in dismissing the plaintiffs' claims, was in fact upholding the right of the PLO to ownership of its assets in the United States against the human rights claims for compensation by the *Tel-Oren* plaintiffs. Looked at in this light, I submit that the dismissal of the plaintiffs' claims was not a neutral act, but rather a recognition that at that time the court of appeals was not willing to accept the consequences of the meaning of international human rights. But it does not mean that the plaintiffs were wrong in asking the court to broaden its perspective. (Of course, the plaintiffs did not argue in these terms; I am simply supplying an after-the-fact theoretical perspective for their general right to claim redress in United States courts.)

Incidentally, focusing upon the assets of the PLO in the United States as providing a sufficient basis for the plaintiffs' legal action in this country may be what the Supreme Court had in mind (though it did not say so explicitly) in the recent *Verlinden* case in which the Court found federal court jurisdiction where a foreign plaintiff was suing a foreign country over a foreign contract whose breach occurred abroad.⁴ Particularly since the Supreme Court's opinion in *Verlinden* was unanimous, the case may indicate that the Court is willing to take a far more vigorous attitude toward internationalizing American jurisdiction than lower federal courts have been expecting.

JUDGE BORK'S OPINION

Judge Bork's complex opinion turns on the question whether international law gives the plaintiffs a "cause of action." Since the court's disposition of the case was on the pleadings, dismissing the plaintiffs' action, the following findings are either explicit or implicit in Judge Bork's holding:

(1) The court has jurisdiction over the case, both with respect to the Israeli plaintiffs (28 U.S.C. §1350) and with respect to the American plaintiffs (28 U.S.C. §1331).

(2) The plaintiffs have "standing" to sue; that is, they are the real parties in interest and have allegedly suffered direct injury.⁵

⁴ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). To be sure, the existence of attachable assets has not been a basis in American law for jurisdiction except in certain in rem cases. *Verlinden* did not make it a basis; my argument in the text is merely that *Verlinden* stands for a stronger international perspective than perhaps lower-court judges realize the Supreme Court is willing to take. If, however, courts were to universalize their perspectives on human rights, my position is that those who deny basic human rights should be accountable in any national court where they or their assets may be found.

⁵ In *Davis v. Passman*, 442 U.S. 226, 240 n.18 (1979), the Supreme Court distinguished between standing and having a cause of action. Cf. note 23 *infra*.

(3) The action is not barred by the "political question" doctrine. (However, Judge Robb, concurring in the result, would have barred the case as a "political question.")

(4) There is no defense of "sovereign immunity" available to the PLO, which is not a "state." (However, one of the defendants, the Libyan Arab Republic, would have been able to assert a sovereign immunity defense had the case proceeded to the merits.)

(5) There is no "act of state doctrine" defense available to the PLO, for the same reason.

However, the missing ingredient from this list is the elusive notion in U.S. law of "cause of action." Let us examine briefly what this notion is and what it is not. The idea of a "cause of action" is not the same as that of "jurisdiction." Let me give a very simple example. Suppose a small-claims court is given jurisdiction over all claims having a value less than \$1,000. That mere statutory grant of jurisdiction does not mean that anyone alleging a claim, no matter how fanciful, of less than \$1,000 may obtain relief in the small-claims court. If A sued B for \$500 for interfering with astrological wave patterns between A and the planet Jupiter, we could simply say that although the small-claims court has "jurisdiction," A has not shown a "cause of action."

What, then, is a "cause of action"? Rather surprisingly, according to the Supreme Court, the phrase became a legal term of art only in 1848 when the New York Code of Procedure used it in abolishing the distinction between actions at law and suits in equity.⁶ This rather late arrival of the term upon the legal scene raises at least a question when it is applied to interpret the alien tort statute (28 U.S.C. §1350), originally passed as part of the Judiciary Act of 1789. Nevertheless, the term under present law appears to carry two different meanings that tend to overlap. In the first place, having a cause of action refers to having "recognized legal rights" that a litigant claims were invaded, which furnishes a basis for a litigant's claim for judicial relief.⁷ Second, Judge Bork explains, "to ask whether a particular plaintiff has a cause of action is to ask whether he 'is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court.'"⁸ Careful readers of Judge Bork's opinion will note that he tends to suppress the first, more traditional, reading of the term; rather, he emphasizes the second meaning, which, as we shall see, is conducive to achieving his desired result of a narrow and restrictive interpretation of international law.

Perhaps even more useful to the goal of achieving a narrow reading of international law are the policy pressures adumbrated by Judge Bork that militate against finding for the plaintiffs. These pressures are summarized by the labels "act of state doctrine" and "political question doctrine," for while these doctrines do not directly apply to the present case, the underlying reasons for them nevertheless exert a steady pressure. The

⁶ 442 U.S. at 238.

⁷ *Id.*

⁸ 726 F.2d at 801 (citing *Davis v. Passman*, 442 U.S. 228, 240 n.18 (1979)).

reasons have to do, vaguely, with separation-of-powers concerns under the U.S. Constitution, judicial interference in foreign policy and the less than precise nature of rules of customary international law. (As an example of the latter, Judge Bork cogently asks whether the law against terrorism applies against an organization such as the PLO, which is not a state and whose members are not public officials. I think this question can be answered in the affirmative under existing customary international law, but only after detailed argument and concededly not as a matter of "black letter" rules.) This is not the place to examine whether the underlying rationales of the act of state and political question doctrines, or even the doctrines themselves, are sound; suffice it for present purposes to note that while Judge Bork uses these rationales as a supporting weight for his analysis of cause of action, it is only a weight and not a conclusive or dispositive consideration. Therefore, we may turn to the main issue, which in Judge Bork's terms is whether international law gives rise to a cause of action in the present case.

Judge Bork does not require an express grant of a cause of action by the rules of international law; indeed, there can be no such express grant because international law clearly is not addressed to the particular concerns of United States courts or their post-1848 concepts of a cause of action. Rather, it would suffice for Judge Bork to be able to infer a cause of action from the body of international law. Nor does Judge Bork draw a distinction between the Alien Tort Claims Act (28 U.S.C. §1350) and the general jurisdiction act (28 U.S.C. §1331) for the purpose of possibly inferring a cause of action from international law, and therefore we need not concern ourselves here with their particular intricacies and differences. However, because the Alien Tort Claims Act is the more specific of the two, providing for federal jurisdiction in "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," Judge Bork's analysis begins with, and focuses largely upon, that Act.

The core of Judge Bork's opinion consists of three arguments: (1) treaties do not provide a cause of action for the plaintiffs; (2) the reasoning applied to treaties carries over to customary international law, which is then seen as similarly not providing a cause of action; and (3) apart from treaties/custom, the law of nations, with very few exceptions, does not provide a cause of action. I will here attempt to summarize Judge Bork's arguments under these three headings, and then, in the next part of this article, I will offer a critique.

(1) The alien tort statute, as we have seen, provides for civil jurisdiction over actions by an alien "for a tort only, committed in violation of the law of nations or a treaty of the United States." The *Tel-Oren* plaintiffs listed 13 alleged treaties as having been violated; of these only 5 are currently binding on the United States.⁹ As to those 5, Judge Bork found

⁹ The 13 alleged treaties listed by Judge Bork, of which the first 5 are binding, are: the Geneva Convention relative to the Protection of Civilian Persons in Time of War, the Convention with respect to the Laws and Customs of War on Land (both Hague Conventions

by examination of their language that they call for implementing legislation by the states parties, or impose obligations upon those parties to fulfill in good faith the purposes of the treaties. Hence the treaties, Judge Bork concludes, are not self-executing. As a result, they do not grant individuals a cause of action to seek damages for violation of their provisions.

(2) Since the alien tort statute mentions the "law of nations" and "a treaty of the United States" without distinguishing between the two, they stand in parity. Hence if a mere violation of the law of nations would itself provide the plaintiffs with a cause of action, a mere violation of a treaty would do the same. But this would mean, according to Judge Bork, "that all existing treaties became, and all future treaties will become, in effect, self-executing when ratified. This conclusion stands in flat opposition to almost two hundred years of our jurisprudence. . . ." ¹⁰ Therefore, a mere violation of the law of nations cannot itself provide a cause of action in U.S. courts. Only those rules of international law which themselves provide that individuals may sue to enforce them may be used to infer a cause of action in American courts. In other words, under Judge Bork's view, most of the rules of international law are similar to a non-self-executing treaty; they have no impact upon individuals. Only a self-executing treaty, or a rule of international law that itself provides for enforcement by individuals, can give rise to a cause of action in courts of the United States.

(3) Even apart from the analogy between non-self-executing treaties and the rules of customary international law, Judge Bork finds that nearly all rules of international law address states and not individuals. He relies extensively upon Oppenheim for this proposition, quoting from the eighth edition:

Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. ¹¹

Noting that international law is becoming increasingly concerned with individual rights, Judge Bork nevertheless finds that human rights law today remains vague and at a high level of generality, consists more of

of 1899 and 1907), the Charter of the United Nations, the Geneva Prisoners of War Convention of 1949, the OAS Convention of 1971 on Terrorism, the Protocols to the Geneva Conventions on Humanitarian Law of 1949, the General Assembly Declaration on the Principles of Friendly Relations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the General Assembly Resolution on Protection of Civilian Populations in Armed Conflicts, the Genocide Convention, the General Assembly Declaration on the Rights of the Child and the American Convention on Human Rights. 726 F.2d at 808-09.

¹⁰ *Id.* at 820.

¹¹ 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 19 (H. Lauterpacht 8th ed. 1955), quoted in *id.* at 817.

aspirations and ideals than of legal obligation, and in any event is not intended for judicial enforcement at the behest of individuals. On this latter point, the *Filartiga* case,¹² upholding jurisdiction upon an allegation of official torture abroad of the son of an alien suing in the United States, is of questionable merit "because the court there did not address the question whether international law created a cause of action that the private parties before it could enforce in municipal courts."¹³

The argument that nearly all rules of international law are addressed to states and not individuals is another way of saying that individuals are not members of the class of litigants that may appropriately invoke the power of the court, which, as we have seen, is the second of two meanings that can be applied to the term "cause of action." Judge Bork's position, therefore, is a general one: that while nations are members of the class of litigants designated by the rules of international law, individuals are not; hence, the former may have a "cause of action," but the latter do not. Moreover, Judge Bork's position applies equally to the alien tort statute (28 U.S.C. §1350) and the general jurisdiction statute (28 U.S.C. §1331); indeed, it would apply to *any* attempt by an individual to invoke international law in United States courts. There is thus an enormous breadth to Judge Bork's ruling: it would pretty much wipe out the invocation of customary international law in American courts (for the instances in which nations, as opposed to individuals, would bring suit in American courts are extremely rare).

But the breadth of coverage of Judge Bork's principle would include the alien tort statute itself, and this gives rise to a particular difficulty: how would that statute *ever* apply to an alien suing for a tort? Judge Bork asks what kinds of alien tort actions Congress might have had in mind in 1789 in enacting the statute. He finds in Blackstone (who was familiar to the Founding Fathers of the Constitution and the attorneys in the first Congress) three classes of cases: violation of safe conducts, infringement of ambassadorial rights and piracy. Judge Bork concludes that these three classes are possibly the only ones Congress meant to reach, but in any event, the present case of torture clearly does not fall under any of them. Judge Bork admits that this leaves "quite modest" the "current function" of section 1350,¹⁴ but given the policy reasons for not entangling courts in foreign affairs questions, that constricted view of section 1350 is acceptable to Judge Bork.

CRITIQUE

(1) Judge Bork argues that only self-executing treaties can give rise to a cause of action for individuals. He thus makes an ingenious link between the concept of "cause of action" and treaties that are "self-executing," a link that I believe is unexceptionable, harmless, and yet irrelevant. It is true that a non-self-executing treaty cannot give rise to a cause of action for individual plaintiffs, but for a reason entirely different from what Judge Bork thinks. The reason is not that there is any intrinsic link

¹² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹³ 726 F.2d at 820 (Bork, J., concurring). ¹⁴ *Id.* at 816 (Bork, J., concurring).

between "cause of action" and "self-executing"; rather, it has to do with the unlikelihood that a non-self-executing treaty would be "violated" in a manner that could cause harm to an individual plaintiff.

To see why this is so, let us consider what a non-self-executing treaty is all about. Such a treaty binds the states parties to it to enact legislation that will implement the treaty principles in their own domestic spheres. Hence, a non-self-executing treaty can only be *violated* if a party to it fails to pass the requisite implementing legislation. In the event of such a failure, that party will be in breach of the treaty vis-à-vis the other parties, but the breach will consist solely in that party's failure to enact the requisite legislation. Suppose, for example, that the United States enters into a treaty with Poland containing the provision that Polish ham should be allowed to be sold in American supermarkets without interference by state or local government, and that the United States undertakes to implement this principle by passing the appropriate legislation. If, after the treaty enters into force, the United States fails to enact the legislation, Poland will have a legitimate complaint that the United States has committed a breach of the treaty. Now suppose that an importer asks for a restraining order in court against local officials seeking to bar the sale of Polish ham. The court might say, along with Judge Bork, that the treaty does not give the importer a "cause of action" in this matter. But the court would be more accurate in saying that the local ordinance barring the sale of Polish ham, which the local officials are seeking to enforce, is valid law because the treaty has not been implemented by Congress. The local ordinance, therefore, is not in *violation* of the treaty. In fact, there has been no violation of the treaty that is relevant to the importer's lawsuit. The "violation" of the treaty that has occurred has nothing to do with Polish ham, or the right to import and sell Polish ham. Rather, the "violation" is at an entirely different level, consisting of the failure of Congress to pass implementing legislation.

Technically speaking, the importer of Polish ham would only have a claim, akin to a shareholder's derivative lawsuit, against the United States Congress, charging that as a member of the public he has been deprived of a property interest (profits in the sale of Polish ham) owing to the failure of Congress to live up to its treaty commitments to Poland. Under present U.S. law, such a lawsuit would have practically no chance of success; it would be barred by lack of standing, the "political question" doctrine and the general constitutional right of Congress to enact or not to enact legislation. But I spell it out here to underline my main point, which is that an individual is not directly "hurt" (except in this attenuated sense of a citizen's derivative lawsuit against Congress) by a "violation" of a non-self-executing treaty.¹⁵

¹⁵ A non-self-executing treaty may nevertheless indirectly produce domestic private effects, including those of influencing the interpretation of a statute, evidencing federal foreign policy that may preempt the states, and generating a rule of customary law that in turn may apply to private parties. See, e.g., Paust, Book Review, *Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. REV. 227, 239-42 (1981); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW*, ch. 5 (1971).

(2) Given the preceding argument, we now see that Judge Bork's fear, that allowing a cause of action under section 1350 for a mere violation of the law of nations would equate to rendering all treaties self-executing, is misplaced. For a non-self-executing treaty is not "violated" the way a rule of customary international law would be violated. Under section 1350, *only* self-executing treaties are capable of being violated in a way that per se affects individual rights. There is no danger that non-self-executing treaties could ever be included under section 1350; nor could their violation be held parallel to violations of the law of nations, simply because only governments can violate non-self-executing treaties and, if and when they do, the "violation" consists only of failure to enact implementing legislation and not the sorts of substantive violations of treaty principles that might be helpful to individual plaintiffs in tort actions under section 1350.

Judge Bork's entire analogy and his fears thus melt away. Not only is there no danger that non-self-executing treaties may be rendered self-executing if his "cause of action" reading of section 1350 is not upheld, but also there is no need to reconceptualize the entire body of customary international law to force it into a category of "providing no cause of action" on Judge Bork's analogy to non-self-executing treaties.

(3) If Judge Bork is mistaken about the parity between the law of nations and treaties in section 1350, he is also on very thin ice about what is left in section 1350, given his own theory that rules of customary international law must impliedly give rise to an individual cause of action before they can be invoked by individuals in U.S. courts. For under his restrictive interpretation of section 1350, it is hard to think of any rule of international law that would be available to an alien suing in tort. As Judge Edwards points out in criticism of Judge Bork's view of section 1350, even the three offenses recognized by Blackstone—violation of safe conducts, infringement of ambassadorial rights and piracy—are not now, and were not in 1789, rules that impliedly create a private right of action to secure their enforcement.¹⁶ Hence, Judge Bork's reading of section 1350 completely guts the statute, even in its original intention as defined by Judge Bork himself.

More generally, Judge Edwards cites Professor Henkin for the proposition that "international law itself, finally, does not require any particular reaction to violations of law."¹⁷ There is a variety of mechanisms by which international rules are enforced. Indeed, as I have argued elsewhere, the very same mechanisms that give rise to international rules of law and ensure their survival over the years against potential competing rules are the mechanisms that account for their enforcement in given cases.¹⁸ To

¹⁶ 726 F.2d at 779 (Edwards, J., concurring).

¹⁷ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 224 (1972), cited in *id.* at 777-78.

¹⁸ D'Amato, *supra* note 2, at 1117-22; see also D'Amato, *Is International Law Really "Law"?*, 79 NW. L. REV. (forthcoming, 1985).

attempt to reshape all of international law through the particular post-1848 American mechanism of a "cause of action" is like trying to force a camel through the eye of a needle. The needle's-eye view is provincial as well as distorting, and ultimately is no more than a surrogate for Judge Bork's attempt to declare all international law irrelevant to decisions reached by American courts.

If we take the traditional meaning of "cause of action," none of this straining is necessary. Under this meaning, which I previously labeled as the first reading of the term given by the Supreme Court, a litigant has a cause of action when he refers to recognized legal rights that he claims have been invaded by the actions of the defendant.¹⁹ Since international law is a part of American law,²⁰ international law may well provide, in appropriate cases, such recognized legal rights. There is a huge number of cases in American law that have turned on rights founded in international law,²¹ including nearly all the cases where the defendant has prevailed not because the plaintiff has failed to state a cause of action, but because the plaintiff's action was barred by defensive doctrines such as sovereign immunity or act of state.²² Thus, by departing from the traditional meaning of "cause of action," Judge Bork's restrictive secondary view of that term logically entails departing from the rule of decision in all of these cases throughout American history.

But what about this second meaning that Judge Bork ascribes to "cause of action," namely, to ask whether the plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the court's power? Judge Bork's argument, as I understand it, is that the proper class of litigants for nearly all rules of international law is the class of nations. International law is a creature of nations, and they may properly invoke it. Thus, individuals do not belong to this proper class of litigants and have no "cause of action" under nearly all rules of international law.

Whether or not this second meaning that Judge Bork gives to the notion of "cause of action" stands up under scrutiny,²³ let us for the moment assume it is correct and inquire whether, in fact, international law is addressed to nations and not to individuals. Judge Bork's authority for his viewpoint is Lassa Oppenheim, a prominent English positivist whose

¹⁹ See *supra* text at note 7.

²⁰ *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

²¹ I estimate some 5,700 cases cited in 1-20 AMERICAN INTERNATIONAL LAW CASES (F. Deák ed. 1971-1982).

²² See, e.g., cases cited in Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983).

²³ It is very close to the notion of "standing," as Judge Bork admits in a footnote, 726 F.2d at 803 n.8. A careful reading of *Davis v. Passman*, 442 U.S. 226 (1979), indicates that the Supreme Court did not endorse in its text the idea of defining a cause of action according to the proper class of litigants, but did make an attempt to define it as such in a (possibly clerk-written?) footnote, 442 U.S. 240 n.18. Even in that footnote, it is hard to discern a real difference between "standing" and this second meaning of "cause of action."

massive text on international law first appeared in 1905; its subsequent editions were last revised by Sir Hersch Lauterpacht in 1955.²⁴ (An examination of the works of some other writers cited by Judge Bork indicates that they, too, largely relied upon Oppenheim.) Was Oppenheim correct in saying that states are primarily the exclusive subjects of the rights and duties arising from international law?

In the first three editions of his book, Oppenheim expressed the view that states only and exclusively are the subjects of international law; later editions qualified this statement by phrases such as "principal," "primarily" and "as a rule." As Lauterpacht, his most recent reviser, writes at length in the eighth edition, individuals may directly be subjects of international law.²⁵ Piracy is a classic example; pirates are by definition outside the municipal laws of the various states, and are subject in the first instance directly to duties imposed by international law.²⁶

To be sure, Oppenheim and other positivists at the turn of the century had some success in arguing that states alone were the subjects and objects of *international law*. The very phrase "international law," which had been invented by the leading positivist Jeremy Bentham in a book he published in 1789,²⁷ seemed to call for an exclusive state-oriented view of that body of law. The elaborate fiction was invented that when an alien is injured abroad, it is the alien's home state that is really injured under international law and not the alien himself. Thus, in the classic *Lotus* case,²⁸ although the person injured was Lieutenant Demons, in fact France "espoused" his claim and brought an action in the Permanent Court of International Justice against the state of Turkey. To carry the fiction through to its logical conclusion, one might suspect that if France had won that case, there would be a definite monetary amount awarded to France to redress France's "injury" and, in turn, the measure of that amount of money would conveniently be based on the damages suffered by Lieutenant Demons. This, indeed, is how the positivist fiction was embellished.

Oppenheim's state-oriented view of "international law," however, has been only a fiction, even though it has captivated the minds of many

²⁴ 1 L. OPPENHEIM, *supra* note 11. Oppenheim himself acknowledged contrary views to the proposition that international law concerns only states. See 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 20 n.1 (2d ed. 1912). Professor Paust has labeled as "nonsense" the Oppenheim-based view that individuals were not in Oppenheim's time, and are not today, recognized as having the direct right under international law to sue or be sued. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 Hous. J. INT'L L. 81, 89 (1981).

²⁵ 1 L. OPPENHEIM, *supra* note 11, at 19-23.

²⁶ See the good, but brief, discussion of Judge Edwards, 726 F.2d at 794 (Edwards, J., concurring). See also A. RUBIN, *PIRACY, PARAMOUNTCY AND PROTECTORATES* 10-12, 34-46 (1974).

²⁷ J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 326 n.1 (Hafner ed. 1948). According to Professor Janis, Bentham deliberately changed Blackstone's fundamental assertion that the law of nations applied to individuals as well as states, Bentham: opting positivistically for only the latter. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AJIL 405 (1984).

²⁸ The Case of S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ, ser. A, No. 10.

people, including Judge Bork. In the *Lotus* case itself, the question on damages agreed to by France and Turkey was, "Should the reply be in the affirmative [to the first question that Turkey acted in conflict with the principles of international law], what pecuniary reparation is due to M. Demons . . . ?"²⁹ Thus, in the classic "positivist" case, the parties by the very terms of their *compromis* saw through the legal fiction and put the issue of damages, their measure and their payment directly upon the injured individual. Nevertheless, through the years many writers, and some states, have found it convenient to adopt the positivist fiction, which tends to exalt the state over the individual. Judge Bork may be sympathetic to this view. But it does not mean that the view correctly reflects the reality of international law.

The 19th-century emphasis on states as subjects of "international law," as coined by Bentham, changed and distorted what the law of nations was at the time of the Judiciary Act of 1789. The law of nations was viewed then in a manner similar to the Roman conception of *jus gentium*. The *jus gentium* was part of the genius of the Roman Empire; instead of applying the laws of Rome directly to foreigners within the empire, the Romans invented the *jus gentium*, which incorporated the customs of the foreigners directly into the law that would be applied to them. The *jus gentium* therefore would apply when a foreigner within the empire was involved in a case, in the same way that section 1350 allows the "law of nations" to be applied to an action in tort by an "alien."

The phrase "law of nations" says a great deal, in contrast to Bentham's phrase "international law." The latter suggests a law that regulates the interactions of nations. But the former suggests a law that is "of" the nations, a law that comes from them and exists as a system of rules and norms. Even Blackstone, despite a prepositivist streak in his writings, regarded the law of nations as "this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of."³⁰ As well summarized by Professor Alfred Rubin, "to Blackstone, the principal parts of the 'law of nations' were not those governing sovereigns in their relations with each other, but those rules of natural law which were, or should have been, identical in all states."³¹

Moreover, we must realize that, from the perspective of 1789, the term "nations" was a lot looser than it is today. Vast areas of Europe were not "nations" in today's sense, the Ottoman Empire was a loose federation of principalities, Germany and Italy were not yet unified, Africa was a "dark continent" and the term "nations" connoted "foreign lands" as well as "states" in the modern sense. The three Blackstonian categories of rules of the law of nations were recognized under the "law of nations" as

²⁹ *Id.* at 5.

³⁰ 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1790).

³¹ Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 21 INT'L PRAC. NOTEBOOK 19, 21 (1983).

applying to individuals, not just "states." An individual with a safe conduct had a right to be respected not only by states or nations, but also by principalities, duchys, groups, armed bands in de facto possession of territory, public organizations (such as the later Red Cross), nonpolitical entities such as the Holy See, capitulatory regimes and so forth. Indeed, the list of political, quasi-political and nonpolitical entities of 1789 was probably longer and more complex than it is today, given the recent spread of the modern state across the world's land surface. The law of nations in 1789, to be sure, applied to interstate transactions such as treaties, but it applied as well to nonstates (treaties could be made with the Vatican). A writer in 1789 would have boggled at the attempt to define the law of nations in terms of its subjects and objects. Instead, classical writers of that time sensibly confined their treatises to the content of the rules of the law of nations. It was simply understood that these rules would apply to whatever entities were appropriate (for example, individuals in the case of piracy, political entities in the case of treaties). All of this was severely distorted when Oppenheim came along and attempted to recast this sprawling and subtle law into the narrow mold of "states."

Yet in the 20th century, particularly among American and English writers who were more persuaded by positivism than their continental colleagues, the state-oriented view of international law for a while made considerable headway. Recently, there has been a sharp reversal of the trend. The newly emerging laws of human rights have changed the perspective away from state-based claims; after all, some of the worst violations of human rights (genocide, torture) are perpetrated by states themselves. In the mid-1930s, when Stalin supervised the genocide of ten million Russian kulaks, the world took little notice; under positivist theory, what a nation did to its own citizens did not amount to a breach of "international law." Today, in the post-Nuremberg world, genocide is a crime that makes relevant, for international legal purposes, what a state does to its own citizens. It also makes relevant, in a way that Oppenheim possibly could not have thought, a claim by an outsider state on behalf of those persons subject to severe human rights deprivations. In the *Tel-Oren* case, it makes relevant to the real interests of the forum court an incident of torture and murder that occurred outside the territorial United States. Ironically, this recent turn to human rights law is in historical perspective a return to the pre-19th-century conception of the "law of nations." While "torture" in the *Filartiga* case may not itself have been part of the law of nations in 1789, the idea of including the concept of torture as part of the law of nations is a lot closer to the original climate of opinion behind section 1350 than Judge Bork's positivistic reluctance to give any real meaning to that statute.

Judge Bork, in sum, has seriously misunderstood the law of nations as it was meant to be understood in the jurisdictional provisions of the Judiciary Act of 1789. He views it through the distorting glasses provided by Oppenheim, and not the way it really was then or is now. But even if

we assume that Judge Bork's constricting notion of "cause of action" as referring to a proper class of plaintiffs is correct, a proper view of the law of nations would support a finding that the plaintiffs in *Tel-Oren* have at least established a cause of action.

CONCLUSION

I am not sure, as a matter of strategy, that the *Tel-Oren* case was worth bringing in the first place. Perhaps our judiciary is not ready for a case such as this one, which may be somewhat ahead of its time. Common law proceeds incrementally, and perhaps a lot of backing and filling was necessary in the human rights field before a claim such as the one in *Tel-Oren* would get a proper hearing.

But I am less concerned about strategy than I am about the state of ignorance regarding international law that is reflected from the bench and from the secondary place held by international law in the curricula of American law schools.³² I feel that we students of international law have not done enough to bring out the richness, depth, subtlety, intellectual value, theoretical challenges, historical evolution and fundamental importance of our subject. Our present students will someday be judges and government officials. If they fail to learn enough in depth about international law in the law schools, they will not pick it up in a crash course led by competing attorneys in an innovative case such as *Tel-Oren*.

ANTHONY D'AMATO*

PROFESSOR D'AMATO'S CONCEPT OF AMERICAN JURISDICTION IS SERIOUSLY MISTAKEN

Professor Anthony D'Amato criticizes a long opinion of Judge Bork rejecting American jurisdiction over various foreign defendants in a tort action growing out of an attack on civilians in Israel by members of the Palestine Liberation Organization. None of the victims was American and there seems to be no connection between the United States and the incident except the temporary presence of agents of various defendants in the United States.

There is much that seems strange in the tort action, but discussion now seems to center on two deeply inconsistent views of standing and jurisdiction that appear to divide those concerned with the protection of human rights. To many Americans today, apparently including D'Amato, the existence of a rule of international law forbidding some outrage on human dignity establishes a valid prescription, and they argue that any court with in personam enforcement jurisdiction over any defendant should exercise that enforcement jurisdiction to apply the universal prescription. This

³² For an expansion of this point, see D'Amato, Book Review, 34 J. LEGAL EDUC. 742 (1984).

* Of the Board of Editors.

approach seems to be based on analogy to maritime law cases, in which in rem proceedings in the admiralty courts of any country are conceived of as applying a universal law of maritime property that has historically been considered part of public international law, including the law of belligerent prize,¹ and partly on natural law reasoning under which all states equally participate in a universal law of nations that is defined to apply to all people, everywhere and at all times.² In the United States, both approaches were popular in the late 18th century. They are incorporated by implication in our Constitution, which seems to give the federal Government jurisdiction exclusive of the jurisdiction of the states to enforce the uniform admiralty law, and concurrent jurisdiction with the states in suits "between a State or the citizens thereof, and foreign States, citizens or subjects."³ This jurisprudential conception of the "law of nations" as embodying a universal natural law is implicit in the Alien Tort Claims Act,⁴ which, in historical and jurisprudential context appears to have been a provision to assure aliens of a fair hearing free from state biases in cases involving the presumed universal natural law, including the law merchant, maritime law, hostages and ransom bills (which might today be regarded as that part of the laws of war that applies to individual claimants) and very little, if anything, else.⁵ As far as historical research shows, the Act was never intended to apply to cases between private parties not involving the great universals of natural law.

D'Amato now proposes that this late 18th-century jurisprudential conception be revived with regard to torture and perhaps some tort liability that might be argued to flow from "war crimes" such as the attack on civilians in Israel, which surely would have been a "war crime" if performed by soldiers in an international armed conflict, and therefore

¹ *The Paquete Habana*, 175 U.S. 677 (1900); *The Zamora*, [1916] 2 A.C. 77.

² "Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna . . . sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit . . ." (True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting . . . but one eternal and unchangeable law will be valid for all nations and all times), CICERO, *DE RE PUBLICA*, bk. III, ch. xxii, §33. It is not clear from the context whether "*lex*," "law" as used by Cicero, would include what we call the positive law, or only the "moral law," and whether its use by courts in disregard of the positive law would be a form of legislation or even permissible under current theories of judicial powers in the absence of positive legislation authorizing its use.

³ U.S. CONST. art. III, §2, para. 1. The states retain a vestige of common law jurisdiction in some cases that might be classified as admiralty cases. But the principle of exclusive federal jurisdiction was not seriously questioned as a matter of constitutional law until the 1850s. *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1857). Further derogations from the plan of exclusive federal enforcement jurisdiction in admiralty occurred later, as the conception of universal natural law prescriptions eroded. In general, see D. ROBERTSON, *ADMIRALTY AND FEDERALISM* 123-35 (1970).

⁴ This "Act," which is really merely a section of the Judiciary Act of 1789, creates jurisdiction in federal district courts concurrent with state courts "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350.

⁵ Cf. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 67 (1769) (American ed. 1790).

can hardly be less a crime if committed by civilians or unrecognized belligerents.⁶

As to the first point, torture, I have already written elsewhere my reasons for doubting the logic or policy of construing the Alien Tort Claims Act to create a cause of action that does not exist in any known "universal" tort law, and removing to federal courts such cases as under the normal American jurisdictional rules would be heard only in state courts, or applying substantive rules of international law, or applying any other body of law than would be applied by the state in which the federal court is sitting under the state's conflict-of-laws rule.⁷

As to the second, the approach taken by D'Amato and others seems to ignore developments in the law since 1789 that show the futility of reviving natural law, "law of nations," approaches to private actions. Those developments lie in two areas: (1) the elaboration of theories of conflict of laws; and (2) the evolution of the international legal concept of *jus standi* as an incident of sovereign equality to deprive a state of the legal power to affect a dispute between others in which it has no legal interest.

As to the first, Justice Joseph Story, a great natural-law theorist and Associate Justice of the Supreme Court under Chief Justice John Marshall, wrote the first comprehensive book in English systematizing the notion of conflict of laws.⁸ Story wrote at great length about the relationship between positive law and universal natural law, concluding: "But it is very questionable, whether or not their [European continental universalists deducing principles from Roman law writings] success has been proportionate to their labor; and whether their principles, if universally adopted, would be found either convenient or desirable under all circumstances."⁹ Story came to the opinion that each state must determine for itself what law should be applied by its tribunals; whether that law was based on universal "reason" or positive legislation was its own concern and nobody else's.¹⁰ The general acceptance of Story's view, coming with greater force because of Story's vigorously expressed natural law abhorrence of slavery and his reluctance as a matter of law to attempt to interfere with foreign states' rules enforcing slavery,¹¹ seems to have rendered the Alien Tort Claims Act an anachronism by the time Story's book was published. Few jurisdictional statutes have been used less in the history of American jurispru-

⁶ Fourth Interim Report of the Committee on International Terrorism, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE 349, esp. conclusion in para. 21, at 354 (1982).

⁷ 21 INT'L PRAC. NOTEBOOK 19 (1983).

⁸ J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834) (photo reprint 1972). The notion of conflict of laws appears in many earlier writings and some famous cases long before 1834, but this is not the place to trace its history.

⁹ *Id.* at 27.

¹⁰ *Id.* at 4-5, 7-9 and 29.

¹¹ *Id.* at 28-29. And compare his dissenting opinion in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), with his opinion as Circuit Judge in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

dence.¹² After a flurry of cases in which "universal" jurisdiction based on a theoretical natural "law of nations" clashed with positivist views of a state's legal authority to apply its prescriptions, including prescriptions purportedly derived from that universal law, the matter was settled as far as the United States was concerned in 1820 by *United States v. Klintock*,¹³ upholding jurisdiction with regard to acts of foreigners abroad only where the victim or property involved was American or the accused was either American or of no nationality at all. In the *Klintock* case, the losing "pirate" was a Mexican licensee of an unrecognized Mexican revolutionary authority who the Supreme Court considered to have been "acting in defiance of all law, and acknowledging obedience to no government whatsoever."¹⁴ The attempt to apply American penal prescriptions to foreigners outside the territory or vessels of the United States was rejected when those foreigners had a nationality, and in retrospect it is possible that even the *Klintock* case gave more to American jurisdiction than later cases would have considered proper.

¹² There is, of course, much more to this evolution than can be set out here, and the "positivist" results of the cases never wholly defied the ability of "naturalist" jurists like Story and Wheaton to continue to assert the theoretical existence of universal prescriptions whose enforcement by uninvolved states was deterred only by policy considerations. See, e.g., Story's opinion for a unanimous Supreme Court in *The Santissima Trinidad* and the *St. Andre*, 20 U.S. (7 Wheat.) 283 (1822), holding the wrongful fitting out of a belligerent vessel to have been "a violation of the law of nations as well as our own municipal laws" (at 348); as a result, subsequent captures were tortious and would require restitution (at 349). On the other hand, the attempt of Venezuela to assert its admitted concurrent jurisdiction in the case was rejected on the express positivist ground that "[i]t would be an attempt to exercise sovereign authority over the court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality" (*id.* at 355).

At the Congress of Aix-la-Chapelle in 1818, Lord Castlereagh had argued unsuccessfully that the slave trade being a violation of the law of nations, the prohibition could be enforced by the British fleet against Portuguese and French traders without permission of the flag states involved. 6 BRIT. & FOREIGN ST. PAPERS 77, 79 (1818-19). The French rejected Castlereagh's argument and the issue was resolved by treaty.

Perhaps the clearest statement of the "positivist" position was by Judge Kane in a charge to a federal district court jury, in a Philadelphia slave-trading case in 1855:

But it is only in the two cases, where the individual accused is himself a citizen . . . or where the property upon which the individual was found perpetrating a wrong was properly recognized as American . . . , that the United States can make a law which would be binding upon all citizens or which could be enforced by courts of justice; and I do not hesitate to say, after something of mature consideration, that if the Congress of the United States, in its honorable zeal for the repression of a grievous crime against mankind, were to call upon courts of justice to extend the jurisdiction of the United States beyond the limits I have indicated, it would be the duty of courts of justice to decline the jurisdiction so conferred.

United States v. Darnaud, 3 Wallace 143, 162, 25 F. Cas. 754 (3d Cir. 1855) (No. 14,918).

The cases in the Supreme Court containing this positivist orientation, but with naturalist arguments that Judge Kane ignored as the law became settled and the time for preserving theoretical positions passed, were *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); and *United States v. Klintock*, *id.* at 144. And see Wheaton's note on the *Wiltberger* case in *id.* at 106-16.

¹³ 18 U.S. (5 Wheat.) 144 (1820).

¹⁴ *Id.* at 152.

The opinion in *United States v. Klintock* was written by Chief Justice Marshall for a unanimous Court, including Story. It purports to be a minor expansion of jurisdiction restricted by *United States v. Wiltberger* and *United States v. Palmer*.¹⁵ The overt rationale for the *Wiltberger* and *Palmer* cases was the Court's view that penal laws must be made by Congress, not by the courts, and that in its vague "piracy" statutes, Congress should not be presumed to have asserted an unlimited jurisdiction; that whatever the substance of the "law of nations" forbidding piracy, the courts' jurisdiction rested on legislation, and in the absence of clear direction that the courts would be bound to follow under the Constitution, the jurisdiction would be restricted to American territory, American nationals and the protection of American property interests.¹⁶

Only one other case has been found in which the United States asserted "universal" jurisdiction over the acts of a foreigner abroad in the absence of any jurisdictional link, *United States v. Bowers and Mathews*.¹⁷ In that case, the majority held that the defendants had cast off all allegiance, which brought the situation into the ambit of the *Klintock* rule. Justice William Johnson dissented on the ground that the defendants' complete rejection of nationality had not been adequately shown, and argued that they should have been released under the *Palmer* rule.

Starting about 1820, the British began to assert "universal" jurisdiction over foreign pirates. In nearly all of the cases before British courts, that assertion was unnecessary; the defendants were either British nationals or the property or person of their victims on the high seas was British. The few exceptions cannot be fully understood unless placed in historical and legal perspective, a job that exceeds the space available for a comment.¹⁸ The most interesting case might be the one during the American Civil War of 1861-1865 in which the federal Government of the United States sought the extradition from Great Britain of Confederate raiders under Article X of the Webster-Ashburton Treaty of 1842, which provided for the extradition of "pirates." The legal personality of the Confederate States was not at the time recognized by either Great Britain or the United States; thus, the Confederates' privateer's licenses were regarded as ineffective. The British refused extradition on the strange and unnecessary ground that "piracy" was subject to universal jurisdiction; thus, no need for extradition existed; thus, the negotiators could not have intended to include "piracy *jure gentium*" in the "piracy" term of the Treaty.¹⁹ The

¹⁵ *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); *Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

¹⁶ *Wiltberger*, 18 U.S. at 94-95; *Palmer*, 16 U.S. at 630-33. These cases long precede the "protective principle" cases developed in the 20th century to reflect other interests.

¹⁷ One of the cases in *United States v. Pirates*, 18 U.S. (5 Wheat.) 184, 195 (1820).

¹⁸ Or even a full-length article. I have attempted it as the chapter of a book. That chapter runs almost two hundred pages, and cannot be understood without reference to yet other material, in total about seven hundred pages of typescript.

¹⁹ *In re Tivnan*, 5 Best & Smith 645, 122 Eng. Rep. 971 (1864). A similar result had been reached by a Canadian court in 1863. The Chesapeake, 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 1080-81 (1906). The Webster-Ashburton Treaty of 1842 is in 8 Stat. 572, TS

fact that there is no record of any British "piracy" trials after this refusal, and that even in the American federal cases, Confederate raiders either were not convicted of "piracy" because of their political motivation,²⁰ or, if convicted, were transferred to prisoner-of-war camps and not hanged for their "crime,"²¹ speaks loudly against these cases evidencing an underlying concept of "universal jurisdiction."

The pattern presented can be rationalized in many ways. The simplest, and therefore the one that by Occam's Razor should be adopted for purposes of philosophical discussion, is that states being equal as sovereigns, any perception of natural law held in any state must reflect only that state's officials' views of the needs of the international order and a value-laden moral system. It is simply impossible within a municipal system by which judges are educated and promoted on the basis of parochial decisions, and whose court system is part of the national constitution of a single legal order, for national judges to be objectively seen as applying any "universal," "eternal" law. This is not to say that they cannot try, and they might be successful, but only that there are inherent problems in converting moral perceptions to law that cannot be overcome by elevating national tribunals to the position of lawmaker.²² The way we overcome the problems of finding "natural law" to apply in real cases is by not attempting to apply it in "criminal law" cases absent legislation directly binding the judicial organ hearing the case, and by replacing natural law universality in tort cases with a conflict-of-laws approach that refers us to the legal order best suited to deal with each foreign aspect of the case. If there is any substance to universal private natural law, the *jus gentium*,²³ then it should make no difference to the case to have it referred to the reflection of that law in the legal order closest to the pertinent facts.

A subtle corollary also seems to flow. If conflict-of-laws referrals are based on the notion that natural law is the law to be found reflected best to suit local perceptions in the legal order closest to particular aspects of

No. 119. The British cases rest on British municipal law implementing the Treaty, 6 & 7 Vict., ch. 76 (1843).

²⁰ *United States v. Baker*, 5 Blatchford 6, 24 Fed. Cas. 962 (C.C.S.D.N.Y. 1861) (No. 14,501).

²¹ J. MOORE, *supra* note 19, at 1079-83.

²² *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, esp. 428 n.26 and 434-35 (1964), opinion by Justice Harlan for the majority of eight.

²³ The distinction between the *jus gentium* and the *jus inter gentes*, i.e., between the law of nations as described by Cicero and the law between states nowadays usually considered the essence of public international law, was brought into modern jurisprudence in England by an admiralty judge, Richard Zouche, by 1650. ZOUCHE, *IURIS ET IUDICII FEICIALIS* 1 (1650) (Carnegie Endowment trans., 1911). Natural law thinkers argued that the same fundamental principles applied to both legal relationships. S. PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS*, bk. I, def. XIII, sec. 24, at 165 (1660) (1672 ed., Carnegie Endowment trans., 1931), arguing that aside from the "*jus gentium*" applied between states as it applies between natural persons, there is no "law of nations" binding states with regard to each other.

a case, then the doctrine of *forum non conveniens*, by which a court refuses entirely to exercise its enforcement jurisdiction in a case properly brought before it, i.e., refuses even to apply its conflict-of-laws rules to resolve the case by the application of an appropriate foreign law, is unrelated to the existence of a closer or better forum. If all states' forums are conceived of as applying the same "universal" law in tort cases, as they are in admiralty cases, then the decision whether to hear a particular case is a matter of the policy of the forum alone, not the result of a search for more appropriate forums, and language to the contrary seems simply the usual preservation of a legal position in theory that has lost in application to the case being decided. If this is so, then the rule of *forum non conveniens* is a reflection of the general notion of *jus standi*; that the forum state simply lacks the interest in the case necessary to involve its judicial officers in applying even its conflict-of-laws rules. As a practical matter, this inhibits the use of national courts in human rights cases involving only foreigners acting abroad, but that inhibition reflects values and principles deep in the legal order. They cannot be overcome by disliking them or preferring a system by which our own values are enhanced at the expense of the basic system itself, including its notions of sovereign equality and the political, i.e., policy-discretion, independence of states. The natural law argument used to pierce national boundaries turns out to cut the other way and reinforce the legal boundaries that determine municipal legal orders, each reflecting the value system the state has chosen through its history and political processes as the best reflection of the natural law as it ought to apply to matters essentially within its own borders.

If this is true, then D'Amato's preference for having American courts apply American conceptions of the *jus gentium* to the acts of foreigners abroad is built on a misconception and reflects theories that have been tried and have failed in the United States. The reasons for their failure are both inherent in the system of public international law and practical. Moreover, there are other ways, consistent with the international legal order, in which states disapproving of "terrorist" attacks on civilian targets can make their positions felt. Some are stated in the form of principles in the 1984 report of the International Law Association's Committee on International Terrorism, including an approach to extradition that seems innovative, and encouragement to use the well-established law of international claims. Private tort actions are not ruled out, but the notion that the gravity of the offense justifies a change in the deeply rooted rules of *jus standi*²⁴ is not part of it. From this point of view, the weaknesses of

²⁴ The ICJ has found the rules relating to *jus standi* sufficient to deprive a claimant of his "day in court" in at least three notable cases: The *Nottebohm Case* (Second Phase) (*Liechtenstein v. Guat.*), 1955 ICJ REP. 4 (Judgment of Apr. 6); the *South West Africa Cases* (Second Phase) (*Ethiopia v. S. Afr.*; *Liberia v. S. Afr.*), 1966 ICJ REP. 6 (Judgment of July 18); and *Barcelona Traction, Light & Power Co., Ltd.* (Second Phase) (*Belg. v. Spain*), 1970 ICJ REP. 3 (Judgment of Feb. 5). Since all known legal systems have rules limiting access to the enforcement mechanisms of the law to parties with a legal interest in the outcome of the case, the rules limiting standing seem to be a part of the general principles

universal jurisdiction to prescribe as the basis for reforming the abysmal human rights situation in the world become clear; and the disregard of fundamental principle by those arguing for a wider adoption of a natural law universality approach indicates the price that will inevitably be paid within the system if that approach is adopted with any consistency by municipal tribunals.

ALFRED P. RUBIN*

PROFESSOR RUBIN'S REPLY DOES NOT LIVE UP TO ITS TITLE

If there were a truth-in-advertising law that applied to essays in the *American Journal of International Law*, Alfred Rubin's reply to my article on Judge Bork could be charged with deceptive packaging. His tentative and speculative contentions hardly prove his title statement that I am "seriously mistaken." Yet his very failure of proof means that my arguments remain valid and that I have suffered no damage. As a result, I may lack standing, or have no cause of action, to bring a case of deceptive advertising against Professor Rubin.

So I am remitted to some brief observations. Rubin says it is "impossible" for national judges to be objectively seen as applying any universal law. But consider the universal prohibition against torture. Is it clearly impossible for a trial judge in the United States objectively and convincingly to find that torture occurred on an Israeli highway when all the witnesses said it did and the perpetrators admitted it and accepted the responsibility publicly? Rubin would grant the same judge the ability to detect torture when it occurs closer to his courthouse, such as in a nearby basement prison cell. According to Rubin, the judge can easily reach an objective conclusion of torture or no torture in that case, even if the facts are in sharp dispute. The conclusion is easily reached, presumably because, as the crow flies or as distances can be measured through earth and concrete, if proximity to the judge reaches a certain mystical point, what was previously impossible to determine suddenly becomes possible (*lex mirabilis*).

Professor Rubin is not against *all* universal rules, for he has discovered a universal rule of natural law all his own. It goes like this: "natural law is the law to be found reflected best to suit local perceptions in the legal order closest to particular aspects of a case." This is a notion I have not been able to find in Grotius, Pufendorf, Oppenheim or even Story, though I suspect that one of these days it may turn up in Woody Allen.

of law recognized by civilized nations at least as much as any rules relating to human rights. It is surprising that so little has been published on the rules and their ramifications.

* Professor of International Law, The Fletcher School of Law and Diplomacy.

Professor Rubin's argument reduces to one proposition: that we should perpetuate the 19th-century distortion of the law of nations rather than go back to the original meaning at the end of the 18th century. Apparently, Rubin is willing to forget that the statute we are discussing was enacted in 1789. He also seems to forget that international law has changed since the 19th century, and that the present law of human rights does not incorporate his pet 19th-century notions of state sovereignty and jurisdictional insularity. Or if he hasn't forgotten that, he presumably believes that the world is entitled to change the law once but not twice. The first change was in the 19th century and we're stuck with it (even though it was a mistake); the second change in the 20th century does not count (even if it restores the original meaning). Despite the fancy packaging, does he expect anyone to *buy that*?

ANTHONY D'AMATO

CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed.

TO THE EDITOR IN CHIEF:

August 28, 1984

When two such legal giants as Professors W. Michael Reisman and Oscar Schachter tangle, as they did in the Editorial Comments of the July 1984 *Journal*, it is the law itself that gets trampled. Reisman is certainly right in noting that Article 2(4) of the UN Charter cannot be interpreted in a vacuum. Its prohibitions against the threat or use of force were part and parcel of a collective security plan that envisaged peaceful settlement of disputes and an international military force. His frustration with the ineffectiveness of the world organization prompted his argument that if the political independence of a people—a major goal of international law—is being subverted by a repressive regime aided by a foreign source, it is within the spirit of the Charter for another state to intervene militarily to preserve the political independence of the suppressed community. Schachter acknowledges the importance of self-rule but doubts that it is secondary to such competing aims as the maintenance of peace. He warns that weakening the restraints of Article 2(4) only increases the risks of armed intervention by powerful states claiming to be responsive to the popular will. He finds Reisman's contention to be flawed and ominous: "it is not, will not and should not be law" (p. 650). Such diametrical views by outstanding experts may cause the perplexed reader to conclude that international law is confused, and ambiguous or useless.

What should be noted is the fact that humankind's effort to control armed violence is part of a long, evolutionary process that has not yet reached maturity. Every nation, town and village has recognized that a tranquil community requires clear laws, courts and an effective system of law enforcement. In international society, these essential ingredients are still in an early stage of development. But there is no reason for despair. The UN consensus definition of aggression, work now being done on a draft Code of Offences against the Peace and Security of Mankind, and the law of the sea illustrate progress in the codification and clarification of norms. The Nuremberg trials to punish aggressors, the courts of human rights and those of the European Community demonstrate the importance of the judicial process. Proposals to improve the United Nations, revise the Charter and strengthen peacekeeping missions reflect other efforts to make international law enforcement more effective. Worldwide demands for demilitarization indicate the urgent need for restructuring the existing world order. All of these efforts must be supported. The Charter plan was never tried and must be given a chance.

Progress is never made in a straight line; there is frequent regression, as illustrated by the refusal of many nations to accept compulsory jurisdiction of the International Court of Justice, the failure to honor the pledges

of the Charter (and the Covenant of the League) that an international force would be created, and the reliance instead on weapons of mass destruction as guardians of the peace. Unilateral use of armed force—for whatever reason—represents the greatest threat to world order for it may become the spark to ignite the tinderbox. Actions that impede progress must be resisted.

Editorial debates are useful for highlighting some of the difficulties, but they should not serve to diminish the enthusiasm for law or the determination to pursue all of the many measures that will be required before international law can be truly effective as an instrumentality for world peace.

BENJAMIN B. FERENCZ
Of the New York Bar

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

PROTECTION OF HUMAN RIGHTS

(U.S. *Digest*, Ch. 3, §6)

Genocide Convention

On September 24, 1984, the Senate Committee on Foreign Relations reported favorably, subject to three understandings and a declaration, the Convention on the Prevention and Punishment of the Crime of Genocide, which the United Nations General Assembly had adopted on December 9, 1948 and which had entered into force, though not for the United States, on January 12, 1951. The Convention had originally been transmitted to the Senate for advice and consent to ratification by President Harry S. Truman on June 16, 1949.

On September 5, 1984, President Reagan publicly asked the Senate to give its advice and consent to ratification of the Genocide Convention. On October 11, after a lengthy floor discussion the previous day, the Senate, by a vote of 87 in favor, 2 against and 11 abstentions, adopted Resolution 478,¹ in which it expressed its support for the principles embodied in the Convention and declared its intention to act "expeditiously" on the Convention in the first session of the 99th Congress.

On September 12, at hearings held by the Committee on Foreign Relations, Elliott Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs, Davis R. Robinson, Legal Adviser of the Department of State, and Theodore B. Olson, Assistant Attorney General in charge of the Office of Legal Counsel, Department of Justice, had testified in support of the Convention. A portion of Mr. Robinson's testimony follows:

The Executive Branch has now completed an extensive review of the Genocide Convention, including the questions raised in the past in connection with its consideration by the Senate of the United States. We undertook this review to examine anew whether ratification of this Convention continued to be in the best interest of the United States. I am pleased to inform you that having completed that review, this Administration believes that no legal impediment exists to the ratification of this important Convention, subject to the three under-

* Office of the Legal Adviser, Department of State.

¹ For the text, see 130 CONG. REC. S14,076 (daily ed. Oct. 10, 1984).

standings and one declaration which the Committee on Foreign Relations itself reported in 1976.

The Genocide Convention can be briefly summarized: The Convention defines the act of genocide, confirms that it is a crime under international law, obliges States which are Parties to enact legislation to make genocide a crime under national law, and specifies that the Parties pledge themselves to grant extradition in accordance with their laws and treaties in force. For the purpose of extradition, genocide shall not be considered a political offense. The Convention also provides that disputes between Parties relating to the Convention's interpretation, application or fulfillment shall be submitted to the International Court of Justice.

The main thrust of the Convention is to require Parties to outlaw genocide within the structure of their own legal systems. Thus, in addition to the Senate's providing advice and consent to its ratification, the Congress must enact legislation which would add to the criminal code a new crime called genocide and set forth criminal penalties for its commission.

It has been argued that genocide is not a proper subject for treaty-making and is essentially a subject within the domestic jurisdiction of sovereign states. The United States is already party to numerous multilateral treaties which deal with diverse matters of concern to the international community, including in the human rights area treaties on slavery and refugees. Recent actions by the Senate, for example in giving advice and consent to the Convention on the Taking of Hostages, reflect the wide range of legitimate topics for international concern. In the present case, 96 countries by ratifying or acceding to the Genocide Convention have indicated their belief that the subject of genocide is a proper concern of nations. International human rights are properly a subject of international concern. Accordingly, I believe the Genocide Convention is clearly within the treaty-making powers of the United States.

It has also been argued that ratification of the Genocide Convention might force the United States at some future date to extradite Americans for trial abroad on trumped up charges of genocide. I want to allay any apprehensions on this point. The careful definition of genocide contained in the Convention, as clarified by the first two proposed understandings, and the procedural safeguards built into our extradition process will prevent this from occurring.

The definition of genocide in the Convention requires the presence of specific elements, in particular a specific intent and the commission of one or more defined overt acts.

Under the Convention, genocide requires for its commission the specific "intent to destroy the group in whole or in part, as such." The Administration supports the clarification in the first understanding proposed by the Foreign Relations Committee in 1976 to the effect that this intention must be one to destroy the group by specified acts "in such manner as to affect a substantial part of the group concerned." This distinguishes the international crime of genocide—i.e. acts taken

with intent to destroy groups—from the domestic crime of homicide—i.e. acts taken with the intent to destroy individuals. The second understanding proposed by the Committee and supported by the Administration specifies that “mental harm” means permanent impairment of mental faculties.

Under Article VII of the Convention the Parties pledge to grant extradition of persons charged with genocide “in accordance with their laws and treaties in force.” Thus the United States would not be required to surrender an individual to any nation if, for example, that country fails to make a showing of probable cause or the United States finds the request for extradition to have been politically motivated. Under the terms of the Convention, once it has entered into force, there shall, however, be no defense to extradition on the grounds that the crime was a “political” one.

Finally, the negotiating history of the Convention, confirmed in the third proposed understanding, makes clear that trial for genocide may also occur in the country of which the defendant is a national. In this regard, the implementing legislation should enable U.S. authorities to prosecute a genocide offense committed by United States nationals outside the United States as an alternative to responding affirmatively to a request for extradition. As previously noted, as the 1976 Foreign Relations Committee declaration supported by the Administration makes clear, the United States will not deposit the instrument of ratification to the Convention until after such implementing legislation is enacted.²

The three understandings and the declaration,³ upon which the committee’s recommendation for Senate advice and consent was conditioned, had been recommended by the committee in previous reports on the Convention. The background to the understandings and declaration is contained in the committee’s analysis of Articles I to IX. The committee explained that it made the analysis in order to be “quite explicit” about its interpretation of the Convention’s provisions, to narrow the meaning of the word “genocide” itself (“so loosely bandied about”), and “not to overstate the scope of the Convention” (“what it does not do”). The analysis was followed by a resumé of the relationship between the Constitution and the Convention, a discussion of the legal effect of understandings and reservations, and the committee’s conclusions. The major portion follows:

GENOCIDE—AN INTERNATIONAL CRIME

ARTICLE I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

² *Genocide Convention: Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 47–48 (1984) [hereinafter cited as *Senate Hearing*].

In his testimony, Mr. Olson reaffirmed the legal opinion recently expressed by Attorney General William French Smith to President Reagan, that no domestic legal obstacles to ratification of the Convention currently existed.

³ See S. EXEC. REP. NO. 50, 98th Cong., 2d Sess. 22 (1984).

The article largely speaks for itself. It adds genocide to numbers of other international crimes which nations have agreed to punish in international agreements pertaining to such matters as protection of submarine cables, pelagic sealing, oil pollution, antisocial conduct such as slave trading, and production and trade in narcotics.

In the past, the power of the United States under the Constitution to make treaties in the human rights field has been questioned on the grounds that the treatment by a state of its nationals is a matter of domestic jurisdiction. This was one of the points once raised in opposition to the Genocide Convention by officials of the American Bar Association. The argument runs that the definition of crimes and prescription of punishment is a matter of purely domestic—and not international—concern and therefore the treaty-making power does not extend to this area. On both moral and practical grounds, the commission of genocide, involving as it must mass action, cannot help but be of concern to the community of nations. An indication that this is so is the fact that 96 nations have subscribed to the proposition that genocide is an international crime. This was also recognized by the United Nations when it proclaimed genocide “a crime under international law” in U.N. General Assembly Resolution 96(1), December 11, 1946. The United States voted in favor of this resolution.

The United States has already recognized in its own domestic law that promoting minimum international human rights standards is of substantial importance in the conduct of American foreign policy. Current law clearly provides that United States foreign economic and security assistance should not be provided to the “government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, . . . or other flagrant denial of the right to life, liberty, and the security of the person . . .” (Section 116 of the Foreign Assistance Act of 1961; see also Section 502(b) of the Foreign Assistance Act of 1961). Surely, genocide is contemplated by such legislation and is a subject, therefore, properly pertaining to our foreign relations. As such, it is also a proper subject for the exercise of the treaty power pursuant to Article II, Section 2 of the Constitution (see *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890), *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931)). This is also demonstrated by the Senate’s action on other treaties concerned with establishing minimum human rights standards including the Convention on the Political Rights of Women, the Inter-American Convention on the Granting of Political Rights to Women, the Slavery Convention of 1926, and the Protocol Relating to the Status of Refugees.

ACTS CONSTITUTING GENOCIDE

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The testimony and discussion of article II have turned on the alleged vagueness of certain of its terms—"in whole or in part," "group," "as such," and "mental harm." While the committee had no particular problem with the meaning of these words, in order to allay any misconceptions, it recommends to the Senate two understandings to this article:

(1) That the U.S. Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such" appearing in article II to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such a manner as to affect a substantial part of the group concerned.

(2) That the U.S. Government understands and construes the words "mental harm" appearing in article II(b) to mean permanent impairment of mental faculties.

The first of these understandings serves to emphasize the importance which the committee attaches to the word "intent." Basic to any charge of genocide must be the *intent* to destroy an entire group because of the fact that it is a certain national, ethnical, racial, or religious group, in such a manner as to affect a substantial part of the group. There have been allegations that school busing, birth control clinics, lynchings, police actions with respect to the Black Panthers, and the incidents at My Lai constitute genocide. The committee wants to make clear that under the terms of article II none of these and similar acts is genocide unless the *intent* to destroy the group as a group is proven. Harassment of minority groups and racial and religious intolerance generally, no matter how much to be deplored, are not outlawed per se by the Genocide Convention. Far from outlawing discrimination, article II is so written as to make it, in fact, difficult to prove the "intent" element necessary to sustain a charge of genocide against anyone.

The second of the understandings was suggested by the executive branch in 1949. The committee continues to believe it will be helpful to eliminate any doubt as to what is meant by "mental harm."

PUNISHABLE ACTS

ARTICLE III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;

- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

The principal question about the meaning of article III concerned the relationship of the words "direct and public incitement to commit genocide" to the freedom of speech guarantees of the first amendment. This question was raised with then Assistant Attorney General William H. Rehnquist in 1970 as follows:

Senator CHURCH. In other words, you are satisfied that such constitutional protection, as presently exists in the field of free speech, would not be adversely affected in any way by the terms of this convention?

Mr. REHNQUIST. I am satisfied, first, that they would not be and, second, that they could not be.

The 1969 case of *Brandenburg v. Ohio* has been cited by many constitutional law authorities as the most significant reaffirmation of the line drawn by the Supreme Court between protected speech and prohibited direct and immediate incitement to action. In that case, the Court said: ". . . the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (395 U.S. 444.) This is a 1969 per curiam decision of the Supreme Court and there is no reason to expect any reversal of this doctrine, with which the language of the Genocide Convention is consistent.

Among those citing this case in previous testimony before the committee was the witness for the American Civil Liberties Union who added: ". . . if this convention did interfere with the first amendment, the American Civil Liberties Union would be the first one to be complaining, without regard to whether or not we commend the objectives of the convention. However, we do not think there is any problem under the first amendment to the Constitution."

PUNISHMENT OF PERSONS

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

While most of the previous testimony on this article attempted to establish that governments, as well as individuals, could be held responsible for commission of genocidal acts, the committee believes that this argument is somewhat strained. The article clearly refers to "persons." The government's responsibility is to punish such persons, whether they are constitutionally responsible rulers, public officials, or private individuals. Since it is unlikely that genocide could be committed without the explicit or implicit approval of the government

notes at this point its belief that the Congress is fully empowered to define certain acts as Federal crimes, as it has already done in many instances—as the killing of heads of state and other foreign officials—and is continuing to do in other categories.

TRIAL OF PERSONS CHARGED WITH GENOCIDE

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

This article has provoked considerable discussion, not because of its language but because of the means suggested for its implementation. Executive branch and other testimony brought out that the negotiating history of the convention makes it clear that the courts of the country in which the accused has citizenship can likewise have jurisdiction over the crime. This theory of concurrent jurisdiction—jurisdiction based on the site of the alleged offense and jurisdiction based on the nationality of the offender—was thoroughly explored during various committee hearings. It was pointed out that a number of nations, particularly colonial powers, have consistently asserted the right to try their own nationals for crimes committed outside their territory. Even the United States in certain limited areas—counterfeiting, theft of Government property, treason, antitrust violations—has exercised jurisdiction over its citizens for acts committed abroad. This concept of concurrent jurisdiction no doubt will be closely examined during consideration of the implementing legislation. However, the U.S. Government should make it clear to the other contracting parties that it intends to construe article VI so as to permit it to try its own nationals for punishable genocidal acts whether committed at home or abroad. For this reason, the committee recommends to the Senate the following understanding:

(3) That the U.S. Government understands and construes article VI of the convention in accordance with the agreed language of the report of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.

The pertinent excerpt from the report referred to in the understanding follows:

REPORT OF THE SIXTH COMMITTEE—U.N. DOCUMENT A/760 AND CORR. 2

[3 December 1948]

[Excerpt]

24. At its 131st meeting, the Committee had agreed to insert in its report to the General Assembly the substance of an amend-

ment to article VI submitted by the representative of India, according to which nothing in the article should affect the right of any State to bring to trial before its own tribunals any of its nationals for *acts committed outside the State*. Following this, the representative of Sweden had requested that the report should also indicate that article VI did not deprive a State of jurisdiction in the case of *crimes committed against its nationals outside national territory*. After some discussion of the questions raised in this connection, the Committee, at its 134th meeting, adopted, by 20 votes to 8, with 6 abstentions, an explanatory text for insertion in the present report. [Emphasis supplied.]*

It should go without saying that the United States cannot exercise jurisdiction unless the accused is in U.S. territory.

Only brief reference needs to be made to the clause in article VI which provides that persons charged with genocide shall be tried "by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction." No such international penal tribunal has been established and the International Court of Justice has no penal or criminal jurisdiction. That part of article VI is therefore a dead letter at this time. If a penal tribunal should be established—and there are no present plans to do so—separate action either through ratification of a treaty or enactment of a law would be required for the United States to accept its jurisdiction.

EXTRADITION

ARTICLE VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VII has no immediate effect. It does not constitute an extradition treaty in itself. It obligates the contracting parties to grant extradition in accordance with their laws and treaties in force and neither U.S. law, nor any extradition treaty to which the United States is a party, specifically covers genocide at this time.

The question of extradition has been carefully examined by the committee in the light of concerns that American citizens might be extradited for trial in foreign courts without the protection of U.S. constitutional guarantees. Ratification of the Genocide Convention, however, does not affect any problem which may exist in this respect.

* The text reads as follows:

The first part of article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, *it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State*. [Emphasis supplied.]

It merely opens the way for adding one more crime—genocide—to the list of crimes for which Americans may be extradited under ratified extradition treaties. Extradition treaties are carefully worded to be as explicit as possible about the definition of the crimes covered and the procedure under which a citizen will be surrendered to another nation for trial. No general sweeping accusation would suffice.

....

ROLE OF THE UNITED NATIONS

ARTICLE VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

In the discussion of this article, the question was raised whether it would broaden or enlarge the powers of the United Nations. Genocide, as the term is accepted by the committee, namely, mass murder on a broad scale, would either jeopardize human rights provisions of the Charter or pose a threat to world peace and therefore it would clearly be within the powers of the United Nations to discuss it. The article itself moreover refers to "action under the Charter of the United Nations" which limits its scope to that document, including the article 2(7) proscription against intervention "in matters which are essentially within the domestic jurisdiction of any state. . . ."

As a practical matter, whether we are a party to the Genocide Convention or not, the United Nations can discuss alleged genocide in the United States or anywhere else any time it so chooses. The committee moreover is quite certain that for propaganda and other purposes spurious charges of this nature will continue to be made in the United Nations, whether we do or do not ratify the Genocide Convention, if only because our position in the world makes us a visible target of discontent. Indeed, we lend more color to such charges by not being a party to the Genocide Convention. This being the case, the question whether article VIII gives the United Nations greater scope to discuss genocide seems relatively immaterial. It is important, moreover, in this connection to bear in mind that such enforcement powers as the United Nations has are lodged in the Security Council, subject to the veto power, which the United States now has demonstrated it is prepared to exercise.

SETTLEMENT OF DISPUTES

ARTICLE IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be

submitted to the International Court of Justice at the request of any of the parties to the dispute.

The jurisdiction of the Court will extend to disputes relating to the interpretation, application, or fulfillment of the convention, including those relating to the responsibility of a state for genocide. It must be noted that such cases will fall under article 36(1) of the Court's Statute which provides:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or *in treaties and conventions in force*. [Emphasis added.]

Cases arising under the Genocide Convention will not be covered by the Connally amendment under which the United States reserves to itself the right to determine which cases it considers to be within its domestic jurisdiction and therefore outside the jurisdiction of the Court. The Connally amendment applies only to article 36(2)—the so-called compulsory jurisdiction clause.

Provisions similar to Article IX are included in many multilateral and bilateral conventions to which the United States is a party. A list of these is contained in the Appendix to this report. Prominent examples include the Japanese Peace Treaty, the Antarctic Treaty, and the Statute of the International Atomic Energy Agency.

It must also be noted that a number of countries, notably Communist countries, have ratified the treaty subject to the reservation that they do not consider themselves bound by article IX. Other countries have taken exception to this action. The United States is expected to do likewise. As a consequence, the United States could invoke the reservation in its own behalf in cases brought by countries making such a reservation.

The committee does not envisage any real difficulties resulting from article IX. No disputes arising from alleged violations of the Genocide Convention have been decided by the Court to date. This is not to say, of course, that the United States might not be someday charged with nonfulfillment of the treaty by another signatory and might even be found in default of its treaty obligation—though this is hard to conceive—just as a practical matter that is where it would end. The Court has no enforcement powers. It is also well to recall that only states party to the Statute can bring cases before the World Court—not individuals or groups. In the committee's view, the fears expressed about the role of a moribund court in genocide matters appear very far-fetched.

THE CONVENTION AND THE CONSTITUTION

Discussion of the Genocide Convention during previous hearings renewed the debate over whether a treaty can authorize what the Constitution prohibits. The Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty" (*Reid v. Covert*, 354 U.S. 1, 16–18). It is therefore

fallacious to claim that the Genocide Convention will supersede or set aside the Constitution of the United States. It will not and cannot do so.

A related argument was raised by some witnesses to the effect that the Congress would have no power to enact legislation making genocide a crime if the convention were not approved. The power of Congress to do so rests on article I, section 8, clause 10, of the Constitution: "The Congress shall have the Power . . . to Define and Punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations . . . ," as well as on the necessary and proper clause. The fact that the Congress enacts a statute pursuant to a treaty, as would be the case in the Genocide Convention, does not alter its competence to enact such legislation in any event.

As regards the respective jurisdiction of Federal and State governments over the crime of genocide, if the treaty is approved, it is the committee's understanding that the enactment of federal legislation punishing the crime of genocide would not occupy the field, to the exclusion of State or local laws on the subject matter, unless inconsistent with the purposes of such legislation or the provisions thereof.

UNDERSTANDINGS AND RESERVATIONS

The understandings and declaration which the committee agreed to recommend to the Senate have been discussed in the text of the report as well as reproduced at the beginning and in the resolution of ratification which is included in this report.

There was considerable discussion as to the nature and effect of these understandings. For this reason, there follows a memorandum on this question, prepared at the committee's request by the Department of State.

. . . .

MEMORANDUM CONCERNING RESERVATIONS AND UNDERSTANDINGS TO TREATIES

[From the Office of the Legal Adviser, Department of State,
March 22, 1971]

A statement made in or accompanying the ratification of a treaty constitutes a reservation when it would exclude or vary the legal effect of one or more of the provisions of the treaty in their application to the reserving State.

A statement made in or accompanying the ratification of a treaty which merely explains or clarifies the meaning of the provisions of the treaty but does not exclude or vary their legal effect would constitute an understanding.

A statement intended by a ratifying State to exclude or to modify the legal effect of one or more provisions of a treaty as applied to that State should be designated by that State as a "reservation". Where a State wishes to set forth its interpretation

of the provisions of a treaty without intending to change their legal effect as understood by it, the statement should be designated as an "understanding".

The designation by the ratifying State is not controlling. Whether the statement modifies the legal effect of the treaty or merely expresses its true intent depends on the substance of the statement and is not solely within the judgment of the State making the statement.

A statement made as a condition to a State's ratification, whether designated as a "reservation" or an "understanding", is communicated by the depositary to the other signatory and acceding States. Each of those States has the right to decide whether the statement modifies the legal effect of the treaty and whether it will consider itself in treaty relations with the reserving State. Failure of other States to object within a reasonable time may be regarded as acceptance by them of the reservation or understanding, which thereupon has legal effect internationally as a condition to the ratification of the State making it.

In United States law a condition placed by the Senate on its approval of a treaty—whether by reservation or by understanding—and included by the President in the instrument of ratification takes effect as domestic law along with the treaty itself. This is a necessary result of the shared constitutional role of the President and the Senate in the treatymaking process.

It is to be noted that the term "reservation" applies only when a statement accompanying ratification "would exclude or vary the legal effect of one or more of the provisions of the treaty in their application to the reserving state." None of the statements recommended by the committee falls under this definition since, in the view of the committee concurred in by the Department of State, they are consistent with the treaty, its negotiating history, and the practice of other contracting states. Indeed, it can be argued that they merely describe the tenor of the implementing legislation to be enacted which is a matter of our domestic concern.

The same logic also applies to the argument that the committee-sponsored understandings somehow weaken or lessen the effect of U.S. ratification of the treaty. It is the committee's view that undertaking to explain what the convention means to the United States in no way downgrades the treaty or the obligations assumed by the U.S. under its provisions. It is a legitimate exercise of the Senate's advice and consent function. The essential point remains that ratification of the convention is worthwhile, regardless of the effect of the understandings.

A related concern that the Supreme Court would disregard the proposed understandings reverts to the allegation that the understandings contravene the explicit language of the convention despite the committee's expressed view to the contrary. The Supreme Court can be expected to give full weight to the view of the committee and

the negotiating history of the convention in any matter that might come before the Court in connection with the treaty.

CONCLUSIONS

Genocide has become a word in altogether too common usage. The committee therefore has been careful in this report to narrow its meaning and not to overstate the scope of the convention. We have been concerned largely with describing what it does not do. We find no substantial merit in the arguments against the convention.

Indeed, there is a note of fear behind most arguments—as if genocide were rampant in the United States and this nation could not afford to have its actions examined by international organs—as if our Supreme Court would lose its collective mind and make of the treaty something it is not—as if we as a people don't trust ourselves and our society. The rhetoric of the opponents, and to a degree the proponents, has obscured what a modest step the convention represents.

Philosophical, moral, and constitutional questions have been raised which go far beyond this modest step and probe man's relationship to his fellow man and the responsibilities of governments to protect the rights of their citizens. These questions appear inherent in the area of human rights treaties and legislation, and it is good that they are raised, because they serve to lift our sights to what is really at issue here, an attempt to curb the excesses of mankind. As our planet becomes more crowded, man's behavior towards his fellows must be governed by standards even higher and more humane. This treaty seeks to set a higher standard of international morality and should be judged on that basis.⁴

JUDICIAL ASSISTANCE

(U.S. *Digest*, Ch. 6, §6)

Evidence in Criminal Proceedings

A foreign embassy asked the Department of State for a copy of United States laws that govern the taking of evidence in foreign countries for use in criminal cases before courts in the United States. The Department of State replied on October 24, 1984:

⁴ *Senate Hearing*, *supra* note 2, at 7–20. Footnote 2 of the committee's report is indicated here by an asterisk.

The report set out a brief background to the Convention (*id.* at 2–3) and a summary of committee actions in its regard since 1970 (*id.* at 4–7). It included, as well, a list of the 96 states parties to the Convention, verified as of Sept. 12, 1984 by the Office of the Legal Adviser (*id.* at 36–37), and a list, "Multilateral Treaties and Other International Agreements of the United States Containing Provisions for Submission of Disputes to the International Court of Justice," prepared under the same date by the Office of the Legal Adviser (*id.* at 37–41).

No United States legislation comprehensively describes how and under what circumstances necessary foreign-source evidence may be obtained for use in federal criminal proceedings.

Federal criminal proceedings are governed generally by title 18 of the United States Code and by the Federal Rules of Criminal Procedure. Typically, evidence for use in criminal cases falls into three categories: witness testimony (written or oral), documentary (e.g., bank records), or physical or forensic (e.g., a weapon). In addition to the type of evidence being sought, the method by which United States criminal courts can obtain necessary foreign-source evidence will depend upon such factors as whether a relevant treaty is in force between the United States and a foreign State, whether the testimony or evidence will be produced voluntarily, whether the foreign State will cooperate in permitting the evidence to be produced for use in an American court, and whether the person who has control of the evidence is a national or resident of the United States.

The Sixth Amendment to our Constitution, which requires that the accused "be confronted with the witnesses against him," may also be a factor requiring that United States courts obtain testimony abroad. If the person overseas who has control of the necessary evidence agrees to produce it voluntarily, and assuming the foreign State has no objection, the party seeking to introduce the evidence can simply invite the witness to attend the proceedings in the United States. In addition, if the person who has control over the required evidence is a national or resident of the United States, a federal court may issue a subpoena compelling the witness's attendance. *See* Rule 17, F. R. Crim. P. . . . , and 28 U.S.C. §§1783-1784. . . . Similarly, a federal court is empowered, when exceptional circumstances exist, to issue orders permitting the deposition of any prospective witness (regardless of nationality) provided that provision is made for the accused's presence. *See* Rule 15, F. R. Crim. P. . . . , and 18 U.S.C. §3503. . . . Special rules apply with respect to official records and other documentary evidence. *See* Rule 27, F. R. Crim. P. . . . ; Rule 44, F. R. Civ. P. . . . ; and 18 U.S.C. §§3491-3495. . . .

If the person who has control of the necessary evidence will not cooperate voluntarily or if the foreign State will not permit voluntary production of the evidence, the only practicable way to obtain the evidence may be pursuant to a letter of request (i.e., a "letter rogatory") addressed by a United States court to the appropriate judicial or other authority in the State where the evidence is located. Absent a treaty providing for letters of request, such letters may be executed in the requested State on the basis of international comity. Although no federal law or rule expressly states that United States courts may seek foreign-source evidence for use in criminal proceedings pursuant to a letter of request, American courts have historically determined that they have inherent power to issue such requests. *See, e.g., United States v. Reagan*, 453 F.2d 165 (6th Cir. 1971). . . . In addition, federal courts infer such power from section 1781 of the Federal Judicial Code, 28 U.S.C. §1781 . . . , and Rule 28(b), F.

R. Civ. P. . . . The letter of request process can be complex and lengthy and does not avoid the necessity of protecting the accused's constitutional right to confront adverse witnesses. A copy of the Department's regulations regarding depositions and letters of request, 22 C.F.R. §§92.49-92.75 is attached. . . .

In order to facilitate the process of obtaining foreign-source evidence, the United States has in recent years entered bilateral treaty arrangements with Switzerland and Turkey concerning mutual assistance in criminal cases and is actively seeking to conclude similar agreements with other States. . . .

Finally, while the Department is unable to provide information concerning the practices of the 50 states and other political subdivisions of the United States, it understands that their practices in this area generally parallel those of the Federal Government as described above.¹

¹ Dept. of State File No. P84 0147-1522. The enclosures to the Department's note are not reproduced here.

JUDICIAL DECISIONS

MONROE LEIGH

Arbitration—New York Convention—enforcement of foreign awards—public policy defense—post-award, prejudgment interest

WATERSIDE OCEAN NAVIGATION CO. v. INTERNATIONAL NAVIGATION LTD. 737 F.2d 150.

U.S. Court of Appeals, 2d Cir., June 18, 1984.

Appellant, International Navigation Ltd., sought review of a district court order confirming foreign arbitral awards entered in London in favor of appellee, Waterside Ocean Navigation Co. Appellant alleged that the awards were based on testimony by appellee's chief executive officer which contradicted testimony given by the same individual in prior judicial proceedings. As such, appellant contended that confirmation of the awards would be contrary to U.S. public policy and would therefore contravene Article V, paragraph 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention).¹ Appellee cross-appealed, arguing that the district court had incorrectly held that it could not award post-award, prejudgment interest under the Convention. The U.S. Court of Appeals for the Second Circuit (per Feinberg, J.) held: (1) that the issues raised concerning the allegedly inconsistent testimony did not preclude confirmation of the awards; and (2) that post-award, prejudgment interest was available in actions brought under the Convention.

With respect to the first issue, the court observed that in light of the Convention's overriding purpose of promoting the recognition and enforcement of awards, the public policy defense must be "construed narrowly" and "should apply only where enforcement would violate our 'most basic notions of morality and justice.'" ² In rejecting the application of the defense in the present case, the court emphasized that the foreign arbitration board knew of the previous testimony when making its decision and that the appellee did not knowingly present perjured testimony.³ The court also rejected appellant's argument that confirmation of the awards would undermine "the integrity of the judicial system." Indeed, to require

¹ June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3. Article V, paragraph 2 of the Convention provides, inter alia: "Recognition and enforcement of an arbitral award may . . . be refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . (b) the recognition and enforcement of the award would be contrary to the public policy of that country."

² 737 F.2d 150, 152 (quoting *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975)).

³ In this respect, the court observed: "We by no means suggest that confirmation should have been denied even if the arbitrators had been unaware of this testimony—although, of course, the argument against confirmation would have been stronger in that case." 737 F.2d at 153.

the court to determine the existence and extent of allegedly inconsistent testimony following arbitration between the parties would "open the door to progressive emasculation of the Convention."⁴

With respect to the issue of post-award, prejudgment interest—an issue of first impression for the Second Circuit—the court noted that in the absence of statutory directives to the contrary, district courts are consistently held to have discretion to award prejudgment interest in cases arising under federal law. With this in mind, the court observed that "the same policy considerations that call for the award of pre-judgment interest in [wholly domestic cases] . . . call for such awards in cases involving arbitration under the Convention."⁵ The court also noted that the appellee could have obtained post-award, prejudgment interest under English law. To require the appellee to obtain confirmation from a British court and enforce that judgment in a U.S. court, solely for the purpose of allowing the appellee to obtain interest which it could not obtain in an American court, would frustrate the Convention's goal of avoiding duplicative litigation.⁶

Arbitration—Federal Arbitration Act—limits on federal court's power to stay foreign arbitral proceedings—doctrine of intertwining

TAI PING INSURANCE CO. v. M/V WARSCHAU. 731 F.2d 1141.
U.S. Court of Appeals, 5th Cir., April 26, 1984.

Appellant sought review of a district court's order staying related foreign arbitration proceedings pending the outcome of litigation in federal court on an underlying claim for damages. Appellant had time-chartered a vessel to appellee, which, in turn, had voyage-chartered the vessel to Asia Cement Corporation to carry coal from New Orleans to Taiwan. En route, the coal began to heat spontaneously, which necessitated a stop in California to off-load the coal. Asia Cement and its insurer, Tai Ping Insurance Co., brought suit for damages against appellant and appellee in the U.S. District Court for the Eastern District of Louisiana. Appellee filed a cross-claim against appellant seeking indemnification if it was found liable. Appellant requested a stay of litigation on the cross-claim pending arbitration in London between appellant and appellee, which was being conducted pursuant to an arbitration clause in the time-charter agreement. The district court granted the stay of litigation on the cross-claim. Relying on its inherent power to control its docket, however, the court also stayed the London arbitration pending its own decision in the underlying suit. The court reasoned that the arbitration would

⁴ *Id.*

⁵ *Id.* at 154.

⁶ Indeed, if this course were followed, the appellant would then lose the benefit of the Convention in the Second Circuit, which has held that the Convention applies only "to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards." *Id.* (quoting *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1319 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974)).

ultimately proceed more expeditiously, and that the possibility of inconsistent factual findings would be avoided, if the question of liability were first determined in court. Appellant appealed, contending that the stay of arbitration contravened the language and intent of the Federal Arbitration Act of 1925 (9 U.S.C. §§1-14, 201, 208 (1982)). The U.S. Court of Appeals for the Fifth Circuit (per Randall, J.) vacated the district court's order and *held*: that the district court had abused its discretion in staying the foreign arbitration.

In support of its holding, the court of appeals relied primarily on the Supreme Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,¹ which emphasized the "strong pro-arbitration policy" embodied in the Federal Arbitration Act. In this respect, the court of appeals observed that a federal court has "narrowly circumscribed authority" to stay the arbitration of an arbitrable dispute, and that "only the most exceptional circumstances" can justify an action by a federal court that impedes arbitration.² Appellee asserted that permitting the claim for indemnity to go forward in arbitration would produce duplication of effort, redundant testimony and the possibility of inconsistent findings. The court responded that "these are the risks that parties to an arbitration clause must be considered to have contemplated at the time they struck their bargain."³ As the Supreme Court noted in *Moses Cone*, duplicative efforts and inconvenience are "misfortune[s]" that occur "because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement."⁴

Turning to appellee's contention that the stay of arbitration was supported by the doctrine of intertwining,⁵ the court observed that the application of this doctrine is strictly limited to cases involving areas of law that Congress has deemed to be within the federal courts' exclusive jurisdiction. These areas, such as federal securities and antitrust laws, are inherently nonarbitrable. The court held that because the instant case did not involve claims falling within the exclusive jurisdiction of the federal courts, the doctrine was inapplicable.

The *Tai Ping* decision strongly endorses the traditional principle that federal courts must defer to arbitration agreements absent extraordinary circumstances. The decision itself provides only two examples of circumstances warranting a stay of arbitration: (1) where claims falling within the

¹ 460 U.S. 1 (1983).

² 731 F.2d 1141, 1144, 1146.

³ *Id.* at 1145.

⁴ *Id.* at 1146 (quoting 460 U.S. at 20 (emphasis in original)). Cf. *Petroleum Helicopters, Inc. v. Boeing-Vertol Co.*, 478 F.Supp. 84 (E.D. La.), *aff'd per curiam*, 606 F.2d 114 (5th Cir. 1979) (stay of arbitration affirmed).

⁵ Under this doctrine, where at least one of several causes of action falls within the exclusive jurisdiction of the federal courts, and it is "impracticable if not impossible" to separate it from the other causes of action, the entire dispute must remain within the jurisdiction of the court, despite the existence of an agreement to arbitrate. *Smoky Greenhaw Cotton Co. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 720 F.2d 1446, 1448 (5th Cir. 1983). See also *Wilko v. Swan*, 346 U.S. 427 (1953).

exclusive jurisdiction of the federal courts are intertwined with arbitrable claims, and (2) where the dispute at issue is not covered by the arbitration clause.⁶

Expropriation—El Salvador agrarian reform—U.S. responsibility for taking of property by foreign government—Fifth Amendment—political question doctrine

LANGENEGGER v. UNITED STATES. 5 Ct. Cl. 229.
U.S. Claims Court, May 14, 1984.

Plaintiffs, U.S. citizens, sued the United States seeking compensation for loss of property in El Salvador. The property, a coffee plantation, was expropriated by El Salvador in 1980 pursuant to a state policy of agrarian reform. Compensation, in the form of long-term Salvadoran bonds, was offered to all affected landowners, including plaintiffs. Believing the compensation to be inadequate, plaintiffs sued the United States, claiming that the U.S. Government, in furtherance of its own foreign policy objectives, had pressured the Salvadoran Government into adopting the agrarian reform program. The U.S. Claims Court (per Kozinski, C.J.) granted defendant's motion for summary judgment and *held*: (1) that the level of the U.S. Government's involvement in the expropriation, and the benefits the United States derived therefrom, were too remote to support a Fifth Amendment claim; and (2) that judicial deference to the executive branch in the area of foreign affairs required dismissal of plaintiffs' claims.¹

According to the court, although the United States may, in some instances, be required to pay compensation for the taking of property of U.S. citizens located abroad, compensation is due only where the U.S. Government—not a foreign government—both directly participates in the taking and directly benefits therefrom. In so holding, the court relied primarily upon *Anglo Chinese Shipping Co. v. United States*,² which held that the United States was not liable for the taking of plaintiff's vessel for use by the Japanese Government, even though the appropriation was made pursuant to an order of U.S. military authorities. Applying the standards set forth in *Anglo Chinese Shipping*, the court in the instant case observed that the plaintiffs had failed to allege that the United States had received a direct benefit from the expropriation, such as a possessory interest in the land in question. Moreover, any "collateral benefits" the United States

⁶ 731 F.2d at 1144, 1146.

¹ Plaintiffs also asserted that the United States was responsible for waiving their claim against El Salvador under international law and that compensation was due under the Fifth Amendment for the effective taking of that claim. As to these contentions, the court held, first, that the same prudential considerations preventing adjudication of plaintiffs' claim for the taking of their land also barred adjudication of their waiver claim; and second, that such a waiver claim cannot be the basis for compensation under the Fifth Amendment. *See Shanghai Power Co. v. United States*, 4 Ct. Cl. 237, 243-46 (1983), *appeal docketed*, No. 84-860 (Fed. Cir. Feb. 28, 1984).

² 127 F.Supp. 553 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955).

may have derived from the Salvadoran agrarian reform policy were "so remote as not to support a taking claim."³

The court also found that "[i]mportant considerations of judicial restraint" provided an independent basis for dismissing plaintiffs' suit.⁴ In the court's view, the plaintiffs' central argument was that the U.S. Government so dominated the Government of El Salvador that it was able to compel the adoption of the agrarian reform policy. Judicial scrutiny of the controversy would therefore require examination of high-level policy decisions by both the U.S. and Salvadoran Governments; and the court would need to inquire into the degree of U.S. dominance over El Salvador, an inquiry with potentially embarrassing and sensitive ramifications.⁵ Moreover, given the U.S. Government's official position that the existing Salvadoran Government was the sovereign government in El Salvador, the court "must conclusively presume that the Salvadoran government acted on its own initiative to promote its country's best interests when it exercised the quintessentially sovereign power of making law."⁶

The court also declined to entertain plaintiffs' suit because a judgment would require application of standards that courts are inherently ill-equipped to apply. In order to render judgment, for example, the court would have to analyze the relationship between the two governments, assess what the Salvadoran Government would have done absent U.S. influence and determine the adequacy of the compensation offered by El Salvador.

Although the ultimate conclusion in *Langenegger* may be both prudent and legally sound, the court's reliance on *Anglo Chinese Shipping* is arguably flawed. In particular, the court's suggestion that the United States must receive some direct "possessory" benefit from the property taken, beyond the mere furthering of U.S. policy interests, appears to be inconsistent with decisions such as *Hawaii Housing Authority v. Midkiff*.⁷ There, the Supreme Court held that a state's appropriation of land in order to transfer it to private persons under a land reform program constituted a "taking" under the Fifth Amendment, despite the fact that the state itself never possessed or used the land. Moreover, the *Anglo Chinese Shipping*

³ 5 Ct. Cl. 229, 232. The court distinguished precedent cited by plaintiffs for the proposition that the United States should be held liable as a "joint venturer" with the Salvadoran Government in the institution of the reform program. See, e.g., *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.), summarized in 77 AJIL 878 (1983), cert. denied, 103 S.Ct. 2431 (1983). The court noted that *Hensel* and similar decisions involved the exclusion from criminal prosecutions of evidence that is obtained illegally by foreign law-enforcement officials acting in concert with U.S. officials.

⁴ 5 Ct. Cl. at 233.

⁵ Cf. *Baker v. Carr*, 369 U.S. 186, 211-13 (1962) (application of political question doctrine).

⁶ 5 Ct. Cl. at 235.

⁷ 104 S.Ct. 2321 (1984). See also *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970) (deprivation of owner's property interest, not accretion of that interest to the Government, gives rise to Fifth Amendment claim).

rationale may be limited to its somewhat unusual facts—the postwar occupation of a defeated country, a situation in which United States constitutional responsibility has been held to be limited on other grounds.⁸

The more intriguing issue raised by *Langenegger* is whether the court's grant of summary judgment was proper under the "political question" doctrine. The case raises interesting parallels to *Ramirez v. Weinberger*,⁹ in which the United States was alleged to have unlawfully occupied a U.S. citizen's property in Honduras in order to train Salvadoran soldiers. In a rehearing en banc, the U.S. Court of Appeals for the District of Columbia Circuit overruled the district court's holding that the suit presented a nonjusticiable political question and concluded that the issue raised by the suit was not the propriety of U.S. policy toward Central America, but whether the United States had unlawfully taken the plaintiff's land, "a paradigmatic issue for resolution by the Judiciary."¹⁰ The court also rejected defendant's assertion that prudential considerations would make issuance of any equitable relief improper. In so holding, the court suggested that plaintiff's potential remedy at law—a suit against the U.S. Government in the Claims Court for monetary relief—may be unavailable because the jurisdiction of the Claims Court is limited to claims seeking compensation for *authorized* takings by the Government, and plaintiff had alleged that the U.S. Government's acts were *unauthorized* by any statutory or constitutional power. The court appears to have assumed, however, that absent this jurisdictional difficulty, plaintiff could pursue a suit in the Claims Court because a claim for monetary relief (as in *Langenegger*), as opposed to equitable relief, would not implicate the prudential concerns that may restrict judicial interference in the conduct of U.S. foreign policy.

Import restrictions—countervailing duties—"generally available" rule

BETHLEHEM STEEL CORP. v. UNITED STATES. 590 F.Supp. 1237.
U.S. Court of International Trade, June 8, 1984.

Plaintiff, Bethlehem Steel Corporation, appealed from a final determination of the U.S. International Trade Administration (ITA) in a countervailing duty investigation of certain steel products from South Africa. In the agency proceeding, the ITA had found that an income tax deduction allowed for the expenses of employee-training programs conducted by South African steel companies did not confer a countervailable

⁸ See, e.g., *Hirota v. MacArthur*, 338 U.S. 197 (1948) (postwar military tribunals held to have been established by U.S. military on behalf of Allied powers, and thus were not U.S. tribunals governed by the Constitution); *Standard-Vacuum Oil Co. v. United States*, 153 F.Supp. 465 (Ct. Cl.), *cert. denied*, 355 U.S. 893 (1957) (United States not liable for use of American citizen's property by forces occupying Japan, two judges concluding that the taking was by Allied powers, not the U.S. Government).

⁹ 745 F.2d 1500 (D.C. Cir. 1984), *vacating* 724 F.2d 143 (D.C. Cir. 1983), *summarized in* 78 AJIL 446 (1984) (as *De Arellano v. Weinberger*).

¹⁰ 745 F.2d at 1512.

subsidy on the ground that the tax benefit at issue was available to all qualified users of the deduction within South Africa, not only the steel industry.¹ At issue was the so-called "generally available" rule—a long-standing administrative practice under which the ITA has required a showing that foreign governmental domestic subsidies² benefit a specific industry or industrial sector before countervailing duties can be imposed on merchandise produced by that industry or sector. The U.S. Court of International Trade (per Watson, J.) affirmed the agency's determination and *held*: that the particular tax program at issue was not a "bounty or grant" and that the steel products involved were therefore not subject to the imposition of countervailing duties. The court, however, expressly limited its holding to the context of tax laws, observing that "tax laws are not subsidies to the taxpayer if their terms are generally available."³

In highly controversial dicta, the court rejected "the broader rationale that, as a rule, generally available benefits are not subsidies."⁴ The court acknowledged that the relevant statute defines countervailable benefits as those provided to a "specific enterprise or industry, or group of enterprises or industries."⁵ The court reasoned, however, that the U.S. countervailing duty law was intended to have broad application and that an "exception" for generally available governmental programs would subvert that intention.

The court's opinion calls into question an aspect of U.S. trade law previously thought to be well settled. It raises the possibility that a wide variety of governmental programs never previously considered to be subsidies—programs ranging from generally available investment tax credits to the provision of public education and public highways—could give rise to countervailing duties on imported merchandise. Such a result would be a vast expansion of the U.S. countervailing duty law as it is currently understood. Since virtually every business enterprise in an industrialized society can be said to benefit from at least some governmental programs, virtually all imports to the United States could potentially be subject to countervailing duties if the dicta of the court were accepted as law. It should be noted, however, that the opinion expressed by the court in the dicta is of doubtful authority and contradicts the opinion of a different judge of the same court.⁶ If the issue is squarely presented in another case, the ITA will almost certainly seek review of an adverse

¹ See 47 Fed. Reg. 39,379, 39,381–82 (1982).

² U.S. law distinguishes between "export" subsidies, which are specifically designed to promote exports, and "domestic" subsidies, which are benefits to a firm's general manufacture or production. See §771(5) of the Trade Agreements Act of 1979, 19 U.S.C. §1677(5). While export subsidies are always countervailable, domestic subsidies are countervailable only under certain circumstances.

³ 590 F.Supp. 1237, 1239.

⁴ *Id.*

⁵ Section 771(5)(b) of the Trade Agreements Act of 1979, 19 U.S.C. §1677(5)(B).

⁶ In *Carlisle Tire & Rubber Co. v. United States*, 564 F.Supp. 834 (Ct. Int'l Trade 1983) (per Maletz, J.), the court approved the generally available rule and noted that without such a rule "almost every import entering the stream of American commerce [could] be countervailed." *Id.* at 838.

holding to the appellate court, the U.S. Court of Appeals for the Federal Circuit.

DECISIONS OF FOREIGN COURTS

CANADA

Federalism in Canada—central Government has exclusive jurisdiction to exploit and legislate with respect to the continental shelf beyond the limits of the territorial sea

REFERENCE RE THE SEABED AND SUBSOIL OF THE CONTINENTAL SHELF OFFSHORE NEWFOUNDLAND. 5 D.L.R. (4th) 385.
Supreme Court of Canada, March 8, 1984.

Acting by virtue of his authority under the Supreme Court Act,¹ the Governor in Council asked the Supreme Court of Canada to determine whether the Province of Newfoundland or the federal Government of Canada had legislative jurisdiction over and the right to exploit the natural resources found in an area of the continental shelf beyond Newfoundland's territorial sea. By unanimous opinion, the Supreme Court *held*: that Canada possessed exclusive jurisdiction to exploit and legislate with respect to this area.²

In the Court's view, Newfoundland's dispute with the federal Government raised questions of both international law and Canadian constitutional law. The Court noted that rights to the continental shelf conferred by international law did not concern common law proprietary rights but rather competing sovereign rights, defined as rights concerning the extra-territorial manifestation of the territorial sovereignty of a coastal state. Thus, three questions were critical to proper disposition of the case: (1) Did international law recognize the existence of rights to the continental shelf before 1949, the time at which Newfoundland became part of the Canadian confederation?³ (2) If so, did Newfoundland have sufficient sovereignty to acquire rights to the continental shelf before 1949? (3) If at some point Newfoundland possessed rights in the continental shelf, were those rights transferred to Canada as a result of Newfoundland's joining the Canadian confederation in 1949?

¹ CAN. REV. STAT. ch. S-19 (1970).

² A few months before the case was submitted to the Supreme Court, the Lieutenant Governor in Council of Newfoundland referred the same question, as it pertained to both the continental shelf and the territorial sea, to the Newfoundland Court of Appeal. The Newfoundland court held that Newfoundland had the rights to exploit and exercise legislative jurisdiction over its 3-mile territorial sea, but not over the continental shelf area. See *Reference re Mineral and Other Natural Resources of the Continental Shelf*, 145 D.L.R. (3d) 9 (1983). The decision has been appealed by both Newfoundland and Canada.

³ Canada as a colony of Great Britain was constituted as a confederation on July 1, 1867, when the proclamation of the British North America Act launched the Dominion of Canada, consisting at that time of Ontario, Quebec, Nova Scotia and New Brunswick. Canada was proclaimed a self-governing Dominion of the British Commonwealth in 1931.

The Court examined these issues first in the context of rights to exploit the continental shelf. The Court found that international law had not sufficiently developed by 1949 to confer such rights upon a coastal state. According to the Court, such rights were generally accepted by international law only after the adoption of the 1958 Geneva Convention on the Continental Shelf.⁴ Moreover, the Court implied that even if such rights existed in 1949, the failure of Newfoundland to assert its rights at that time was a serious weakness in its case, since international law did not confer such rights *ipso jure*.

Relying on the *North Sea Continental Shelf Cases*,⁵ Newfoundland argued that developments in international law governing the continental shelf should be accorded retroactive effect, thereby vesting Newfoundland with rights to the shelf area as of 1949. The Court, however, disagreed, observing that "[t]he development of customary or conventional international law is, by definition, the development of new law. There is no concept in international law of discovering law that always was."⁶

Even assuming, *arguendo*, that rights to the continental shelf area existed prior to 1949, the question arose whether Newfoundland at that time possessed sufficient external sovereignty to acquire those rights. On the basis of Canadian constitutional law and historical fact, the Court found that as of 1949, Newfoundland did not possess sufficient external sovereignty to acquire any rights in the continental shelf. Although Newfoundland may have been an independent sovereign entity between 1926 and 1934,⁷ Newfoundland's continuing financial difficulty resulted in Great Britain's reestablishing and maintaining direct rule from 1934 until 1949. Newfoundland's status as a colony during the latter period meant that any rights to the continental shelf acquired under international law during that period devolved upon Great Britain (the external sovereign authority), not Newfoundland.

The Court also rejected Newfoundland's argument that the formal instrument of confederation entered into in 1949 between Canada and Newfoundland, known as the "Terms of Union," preserved Newfoundland's external sovereignty as of 1933. On the basis of its interpretation of the Terms of Union, the Court found that even if Newfoundland had possessed rights to exploit the continental shelf in 1949, those rights would have had to devolve at that time "to the only entity within Canada possessing external sovereignty—the Crown in right of Canada."⁸ Thus,

⁴ 15 UST 471, TIAS No. 5578, 499 UNTS 311.

⁵ 1969 ICJ REP. 3 (Judgment of Feb. 20). ⁶ 5 D.L.R. (4th) 385, 417.

⁷ In 1926, the then existing colony of Newfoundland participated with Great Britain and other British Dominions in the Imperial Conference. The Conference produced the Balfour Declaration which recognized, under British Imperial constitutional law, that the Dominions (including Newfoundland) possessed external sovereignty. Subsequently, at the request of the Newfoundland Assembly, the British Parliament enacted the Newfoundland Act of 1933, which, according to the Court, effectively transferred Newfoundland's governing sovereignty to the United Kingdom.

⁸ 5 D.L.R. (4th) at 410.

the Terms of Union did not permit Newfoundland to exercise external sovereignty concurrently with or apart from the federal Government of Canada.

Having resolved the various questions with regard to the competing claims to the right to exploit the continental shelf area, the Court perfunctorily concluded that jurisdiction to legislate with respect to the area also resided in the federal Government.

It may be noted that nearly two decades ago, the Supreme Court of Canada decided, albeit on different grounds, that British Columbia—another Canadian province—did not have jurisdiction over the continental shelf beyond British Columbia's territorial sea.⁹

UNITED KINGDOM

Conflict of laws—antisuit injunction—English court's injunction halting antitrust proceedings in U.S. court dissolved

BRITISH AIRWAYS BOARD v. LAKER AIRWAYS LTD. [1984] 3 W.L.R. 413. House of Lords, July 19, 1984.

Appellant, Laker Airways Ltd. (Laker), appealed a decision of the English Court of Appeal enjoining it from pursuing an antitrust action in the U.S. District Court for the District of Columbia against the British Airways Board (the Board) and British Caledonian Airways Ltd. (Caledonian). The House of Lords (per Lord Diplock) dissolved the injunction and *held*: that Laker could not be enjoined by a United Kingdom court from pursuing its antitrust lawsuit in the United States.

In 1977, Laker received permission, pursuant to a bilateral treaty between the United States and the United Kingdom known as "Bermuda 2,"¹ to operate scheduled airline service between New York and London. A number of U.S. and foreign airlines were already servicing this route and were members of the International Air Transport Association (IATA). Through the IATA, these airlines participated in a series of cooperative arrangements, including a uniform fare structure and coordinated flight

⁹ See Reference re Ownership of and Jurisdiction over Offshore Mineral Rights of British Columbia, 1967 S.C.R. 792. In that case, two questions were addressed by the Court: (1) whether British Columbia had jurisdiction over the territorial sea contiguous to its shoreline, and (2) whether it had jurisdiction over the adjoining continental shelf. It was held that British Columbia (unlike Newfoundland) did not have jurisdiction over the territorial sea because it had failed to assert its claim to that area before its admission into the Canadian confederation in 1871. The Court therefore held that the rights to the territorial sea were vested in Canada, which also held the rights in the continental shelf area beyond the territorial sea. Since Newfoundland, unlike British Columbia, had jurisdiction over the territorial sea, the Court in the instant case examined international law pertaining to the continental shelf apart from the territorial sea issue.

¹ Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, July 23, 1977, 28 UST 5367, TIAS No. 8641.

schedules. Laker did not join the IATA; rather, it challenged the entire IATA uniform fare system by implementing a policy of low-cost, no-frills service. After several years of success and profit, financial disaster struck in early 1982. Laker subsequently filed suit in U.S. District Court for the District of Columbia, claiming that members of the IATA (including the Board and Caledonian) had conspired, in violation of the U.S. antitrust laws, to drive Laker out of business.

In response, Caledonian and the Board brought suit in the United Kingdom seeking an injunction to restrain Laker from pursuing its antitrust action in U.S. court. The UK trial court refused to grant a permanent injunction but issued temporary relief pending an appeal to the English Court of Appeal. Shortly thereafter, in 1983, the UK Secretary of State, acting pursuant to his authority under the Protection of Trading Interests Act of 1980, issued two "Directions" prohibiting UK persons from complying with any U.S. antitrust requirement, prohibition or discovery request without first obtaining authorization from the Secretary. The English Court of Appeal subsequently enjoined Laker from pursuing its U.S. antitrust action, treating the Order and the Directions of the Secretary of State as the "decisive factor" and holding that they would unfairly disadvantage the UK defendants in the U.S. action.

On appeal, the House of Lords reversed. The House of Lords held that under the circumstances presented, an "antisuit" injunction should be issued only if a court properly found that the UK person in question had a right *not* to be sued. Such a right could exist by agreement (e.g., an exclusive jurisdiction clause in a binding contract) or by way of a defense that could be given anticipatory effect (e.g., laches, promissory estoppel or waiver). In sum, only if Laker's lawsuit against the Board and Caledonian were found to be "unconscionable" would injunctive relief barring further litigation in U.S. court be appropriate.

The Board and Caledonian asserted that Laker's lawsuit was indeed unconscionable since the allegedly unlawful activity had been sanctioned by the appropriate UK regulatory regime (i.e., through the issuance of an operating license by the UK Civil Aviation Authority) and consented to by Laker when it voluntarily sought and received permission to operate in the North Atlantic region. The House of Lords disagreed, noting that a UK operating license could not insulate the Board and Caledonian from the application of U.S. domestic laws (including the antitrust laws) to activities carried out within U.S. jurisdiction.

The Board and Caledonian also relied on the UK Government's view that the United States had breached the Bermuda 2 treaty by failing to secure an antitrust exemption (presumably through the Civil Aviation Board) for the activities of the Board and Caledonian in the United States. In response, the House of Lords stated that the Bermuda 2 treaty was not enforceable by an English court, since it had never been incorporated into United Kingdom law by legislative act. Thus, a UK court could not interpret the treaty. Any defense based upon a breach of the treaty was therefore speculative and premature.

Caledonian also contended that, based on the evidence, Laker had improperly joined it as a defendant. The House of Lords found this argument to be premature since under U.S. law pretrial discovery was necessary to uncover evidence that either exculpated or implicated Caledonian in the alleged conspiracy.

The House of Lords upheld the validity of the Secretary of State's Directions (which had been challenged by Laker), but found that these Directions did not disadvantage the Board and Caledonian vis-à-vis the U.S. antitrust action. Contrary to the English Court of Appeal's interpretation, the House of Lords held that the Directions did not prohibit either the Board or Caledonian from complying with a U.S. court's final judgment in an antitrust action. Moreover, in the event of a treble damage award, the defendants in the U.S. action could seek recovery under the Protection of Trading Interests Act in UK courts against the U.S. plaintiff for the noncompensable damages. Regarding the Secretary's prohibition against complying with discovery requests, both the Board and Caledonian had asserted that evidence in their possession was exculpatory. Assuming this to be true, both the Board and Caledonian could request permission from the Secretary of State to produce this evidence, which he would undoubtedly authorize.

The House of Lords decision brings to a close an extended judicial dispute between the United Kingdom and the United States regarding the propriety of Laker's antitrust action. The decision relies upon Lord Diplock's observation that *only* the U.S. court has jurisdiction over the subject matter of the dispute and that English law does not grant Laker a cause of action based on the facts asserted. In such circumstances, the UK court was not being asked to issue an injunction in order to protect its jurisdiction or to determine a convenient forum. Rather, an injunction would have terminated the litigation and, in essence, decided a case arising exclusively under U.S. law against Laker. Since there was no compelling reason to grant such drastic relief, the House of Lords denied the plaintiff's request for an injunction. This result is consistent with Judge Wilkey's decision for the U.S. Court of Appeals for the District of Columbia Circuit in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*.²

Sovereign immunity—United Kingdom Act—garnishment of embassy bank account—definition of “commercial purposes”

ALCOM LTD. v. REPUBLIC OF COLOMBIA. [1984] 2 All E.R. 6.
House of Lords, April 12, 1984.

Appellant, the Republic of Colombia, sought review of a decision by the English Court of Appeal granting garnishee orders in favor of respondent, Alcom Ltd., against bank account funds held by the embassy of Colombia in the United Kingdom. The respondent had obtained the

² 731 F.2d 909 (D.C. Cir. 1984), summarized in 78 AJIL 666 (1984).

garnishee orders against the funds in order to enforce a default judgment against Colombia for moneys owing on goods sold and delivered. The Court of Appeal found that the funds, which were used for the day-to-day expenditures of the embassy, were used or intended for "commercial transactions" and therefore constituted property against which execution could be levied.¹ The House of Lords (per Lord Diplock) allowed the appeal; set aside the garnishee orders and *held*: that in the absence of proof that the embassy's bank account was earmarked by the foreign state to be used solely for commercial purposes, the account would be immune from garnishment.

The question of law on appeal to the House of Lords was whether an English court has jurisdiction in garnishee proceedings to order the attachment of a foreign state's funds located in the UK bank account of the state's embassy in order to satisfy a judgment that has been validly obtained against that state by a creditor.

The House of Lords first examined public international law relating to sovereign immunity. The House noted that the West German Constitutional Court in the *Philippine Republic*² case of December 13, 1977 had found that public international law required that immunity from execution be accorded to the local bank account of the Philippine diplomatic mission used for defraying the day-to-day expenses of running the mission. Relying on the reasoning of the German court in the *Philippine* case, the House of Lords concluded that public international law would accord immunity from garnishment to the Colombian embassy's bank account.

The House of Lords proceeded to determine the application of the United Kingdom State Immunity Act of 1978, particularly those provisions relating to the enforcement jurisdiction of an English court against a foreign state.³ In this respect, the House of Lords was faced with the question whether the Colombian embassy's bank account, which was used for paying routine expenses of the diplomatic mission, constituted property in use or intended for use for "commercial purposes" within the meaning of the Act.

Section 13(2)(b) of the Act provides that the property of a foreign state "shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale." Section 13(4), however, creates a limited exception to this broad immunity for "any process in respect of property which is for the time being in use or intended for use for commercial purposes." The term "commercial purposes" is defined in section 17 by reference to the term "commercial transaction," which, in turn, is broadly defined in section 3(3) to include,

¹ 127 Sol. J. 784 (1983), summarized in 78 AJIL 451 (1984).

² Summarized in 73 AJIL 305 (1979), corrected in *id.* at 703.

³ The State Immunity Act draws a distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom. Sections 2 to 11 deal with adjudicative jurisdiction and sections 13(2) to (6) and 14(3) and (4) deal with enforcement jurisdiction.

inter alia, any contract for the supply of goods or services. The "prima facie breadth" of this definition of "commercial transaction," however, is considerably narrowed by several factors, including the express exclusion of contracts of employment from the definition of "commercial transaction" and the general exception to immunity (set forth in section 6(1)) with respect to proceedings relating to immovable property in the United Kingdom.⁴

The House of Lords acknowledged that an embassy's bank account used for routine expenses may, indeed, include moneys due under contracts for the supply of goods or services and might therefore be covered by the extended definition of "commercial purposes." However, the Colombian ambassador had certified to the court that the embassy's bank account was "not in use nor intended for use for commercial purposes."⁵ Section 13(5) of the Act provides that such a certificate shall be accepted as sufficient evidence of the facts so stated unless the contrary is proved; and the House noted that the respondent in this case had not carried its burden of proof to rebut the certificate. With this in mind, the House of Lords held that "[u]nless it can be shown by the judgment creditor who is seeking to attach the credit balance . . . that the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn on to settle liabilities incurred in commercial transactions,"⁶ it could not be garnished in an enforcement proceeding.

By requiring a judgment creditor to establish for attachment purposes that an embassy bank account is earmarked "solely" to settle liabilities arising from commercial transactions, the House of Lords appears to create a blanket immunity from execution for all embassy bank accounts that are used at least in part for diplomatic expenses. From the language of the opinion, the House of Lords would appear to take the same view even if confronted with an embassy bank account admittedly used for mixed purposes. It can only be conjectured as to the extent of the "de minimis exceptions" that the House of Lords had in mind. In any event, the result in *Alcom* appears to be contrary to the view adopted by the U.S. District Court for the District of Columbia in 1980.⁷

⁴ With respect to the immovable property exception, the House noted that the exception does not depend on whether or not the property is used for "commercial purposes." The House also noted, however, that the special status of a state's diplomatic mission (which consists, of course, of immovable property) is affirmatively recognized in section 16, which provides that the immovable property exception in section 6(1) "does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission."

⁵ 2 All E.R. 6, 13.

⁶ *Id.*

⁷ See *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F.Supp. 311 (D.D.C. 1980), summarized in 75 AJIL 373 (1981). In *Birch*—in contrast to *Alcom*—the foreign sovereign had waived its immunity and had admitted that the embassy's bank account was used not only for governmental purposes but also for limited commercial purposes. The court in *Birch*, applying the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330,

DECISIONS OF THE IRAN-U.S. CLAIMS TRIBUNAL

Nationality—claimant as member of a consortium agreement with a non-U.S. national—counterclaims

MORRISON-KNUDSEN PACIFIC LTD. v. MINISTRY OF ROADS & TRANSPORTATION. AWD 143-127-3.

Iran-United States Claims Tribunal, The Hague, July 13, 1984.

Claimant, a U.S. corporation that had a 50 percent participation in a consortium agreement with a French corporation, COFRARAN, S.A.R.L. (Cofraran), to provide engineering services for a proposed Iranian motorway, filed a breach of contract claim in the Iran-United States Claims Tribunal¹ against respondent, the Iranian Ministry of Roads and Transportation. Respondent, in addition to defending on the merits, contended that the Tribunal lacked jurisdiction on the ground that claimant was not a U.S. national under the terms of the Claims Settlement Agreement. Respondent also filed counterclaims against both claimant and Cofraran based upon alleged breaches of three contracts, two of which were not the subject of the original claim. Chamber Three *held*: (1) that the Tribunal had jurisdiction over the claim; (2) that claimant's alleged breach of one independent contract was not a defense to respondent's liability under another; and (3) that the Tribunal's jurisdiction extended only to counterclaims against claimant, not Cofraran, and only to those counterclaims that arose out of the same transaction that formed the basis of the claim. On these and other grounds, the Chamber awarded claimant \$1,291,537.09 plus interest as its 50 percent share of the damages sustained by the consortium.²

With respect to the Tribunal's jurisdiction over the claim, the Chamber found that claimant had provided sufficient evidence to establish that U.S. citizens had owned interests equivalent to more than 50 percent of claimant's capital stock from the time the claim arose until January 19, 1981, thereby satisfying the requirements of Article VII(1) of the Claims Settlement Agreement.³ The Chamber also observed that claimant and Cofraran were not "partners" under the terms of their consortium agreement and that, moreover, they were "individual parties" to the contract with respondent. In addition, claimant had submitted evidence that under Swiss law, which governed the consortium agreement, the

1602-1611 (1982)), held that the judgment creditor could properly attach the foreign embassy's bank account, despite the fact that the account was "not used solely for commercial activity."

¹ For background information on the Iran-United States Claims Tribunal, see 77 AJIL 642 (1983).

² Parviz Ansari Moin, the Iranian-appointed arbitrator, dissented. His dissenting opinion has not yet been issued.

³ See *Flexi-Van Leasing Inc. v. Islamic Republic of Iran*, Claim No. 36, Order of Dec. 20, 1982 (Chamber One), and *General Motors Corp. v. Islamic Republic of Iran*, Claim No. 94, Order of Jan. 21, 1983 (Chamber One), both summarized in 77 AJIL 642 (1983).

consortium was not a juridical person that could maintain a claim. Under these circumstances, and “[w]ithout expressing any views on the rights of partners to assert individual claims,”⁴ the Chamber concluded that the claim at issue was that of a U.S. national within the meaning of Article VII(2) of the Claims Settlement Agreement.⁵

Turning to the merits, the Chamber first addressed the claim that respondent had wrongfully refused to pay invoices due under a contract for the design of certain sections of the proposed motorway. Respondent contended that its financial disputes with the consortium under two other contracts—related but not identical to the principal contract—justified respondent’s nonpayment under the principal contract. The Chamber disagreed, observing that the obligations under the principal contract were not “interdependent with the obligations” under the two related contracts. The Chamber therefore rejected respondent’s defense, noting that “[a] claim under one independent contract is not a defence to liability under another.”

The Chamber also addressed claimant’s claim for reimbursement of expenses allegedly incurred as a result of respondent’s delays in supplying certain necessary data. Respondent contended that the contract provided for termination as the sole remedy for such delays. In rejecting this defense, the Chamber noted that the contract provision relating to termination was not exclusive and that “as a general principle of law, a party may recover for losses suffered as a consequence of contract breach irrespective of whether a right also exists to terminate the contract.” After a close analysis of the contract’s terms and the performances of the parties, the Chamber awarded claimant damages for respondent’s delays plus a reasonable sum for additional work performed by claimant on the basis of *quantum meruit*.

Finally, the Chamber addressed respondent’s counterclaims, which were directed against both claimant and Cofraran. As to these, the Chamber first observed that “[i]t is clear from both [Article II(1) of the Claims Settlement Agreement] and from the Tribunal Rules that the Tribunal’s jurisdiction extends only to counterclaims which are presented against claimants.” Accordingly, the counterclaims against Cofraran were summarily dismissed. The Chamber also held that the three contracts upon which respondent based its counterclaims were not part of a single

⁴ Chamber One has ordered the parties in another case to prepare memorials addressing the issue of the Tribunal’s jurisdiction over claims of U.S. nationals participating with non-nationals in partnerships or associations. See *Haus International, Inc. v. Tehran Redevelopment Corp., Iran*, Case No. 174, Order of Jan. 13, 1984 (Chamber One).

⁵ Article VII(2) defines claims to include

claims that are owned indirectly by [U.S.] nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of [the Claims Settlement Agreement].

"transaction" within the meaning of Article II(1) of the Claims Settlement Agreement.⁶ Considering only those counterclaims arising from the contract that formed the basis of the claim, the Chamber concluded that claimant had not breached its duties under that contract. Accordingly, all of respondent's counterclaims were dismissed.

Force majeure—frustration of contract—monetary consequences

GOULD MARKETING, INC. v. MINISTRY OF DEFENCE OF IRAN. AWD 136-49/50-2.

Iran-United States Claims Tribunal, The Hague, June 29, 1984.

Claimant, Gould Marketing, Inc., filed a claim for contract damages in the Iran-United States Claims Tribunal against respondent, the Iranian Ministry of Defence. The contract at issue required claimant to provide respondent with goods and services from 1976 to 1986. In June 1979, respondent failed to make a scheduled payment of over a million dollars. In its claim before the Tribunal, claimant sought damages for goods delivered and services rendered through 1979 and also for all future scheduled payments due for the term of the contract. Respondent counterclaimed for approximately ten times the amount of the claim. In a previous interlocutory decision in the same case, Chamber Two held that *force majeure* conditions prevailing in Iran during 1978–1979 justified nonperformance by both parties and that the continued existence of these conditions had ripened by mid-1979 into a termination of the contract since by that time "[p]erformance had become essentially impossible."¹ The Chamber also decided, however, that a final award could not be rendered until additional arguments were heard on the issue of what consequences should result from the discharge of the contract under these circumstances. In its final award in this case, Chamber Two *held*: that claimant was entitled to payment only to the extent of its actual performance and therefore must return to respondent any payments previously received in excess of that amount.

In so holding, the Chamber observed that termination of the contract through frustration had obviously resulted in hardships for both parties. Under American law, which governed the contract, the "general principle" applied to allocate the consequences of such frustration "is that amounts due under the contract are to be proportioned to the extent the contract was performed."² Thus, if no payment has been made, the performing

⁶ Article II(1) of the Claims Settlement Agreement gives the Tribunal jurisdiction over counterclaims that arise "out of the same contract, transaction or occurrence that constitutes the subject matter of . . . [the claimant's] claim."

¹ See *Gould Marketing, Inc. v. Ministry of National Defense of Iran*, ITL 24-49-2, summarized in 77 AJIL 893 (1983).

² The Chamber found additional support for this principle under English law since 1943 and in civil law.

party is entitled to payment to the extent of its performance. On the other hand, if payment has been made, the party that received the payment is entitled to retain an amount proportionate to its performance and must return any excess payments. In addition, the Chamber noted that it should avoid "unduly burdening" either party with hardships arising from the termination.

Applying this principle to the instant case, Chamber Two allocated the contract price among eleven elements of performance that claimant was obligated to provide. It proceeded to determine the extent to which these elements had been performed and made monetary adjustments for non-performance or partial performance. Based on these calculations, the Chamber determined that claimant had performed services worth approximately 16½ million dollars. As claimant had already received approximately 19½ million dollars from respondent, claimant was obligated to return approximately 3 million dollars. In addition, respondent was awarded interest at a rate of 10 percent per year (as stipulated in the contract) from September 1, 1979 (the date on which claimant stopped its performance) to the date of the award.

In this decision, the Chamber also addressed a separate claim involving a related contract between the same parties. With respect to that claim, the Chamber rendered an award in favor of claimant. A setoff was then made, resulting in a net award payable to respondent.

Shafie Shafeiei, the Iranian arbitrator in Chamber Two, concurred in the Chamber's decision relating to the first claim and dissented from the decision relating to the second. With respect to the first claim, Arbitrator Shafeiei asserted that claimant had breached the contract and that, accordingly, respondent could not be expected to continue its payments. Nevertheless, Shafeiei concurred in the Chamber's decision as to that claim.

CURRENT DEVELOPMENTS REGARDING JUDICIAL DECISIONS REPORTED IN THE JOURNAL, 1984

- Alcom Ltd. v. The Republic of Colombia*, 127 Sol. J. 784, 78 AJIL 451; reversed by House of Lords, [1984] 2 All E.R. 6, 79 AJIL 143.
- Allied Bank International v. Banco Credito Agricola de Cartago*, 566 F.Supp. 1440, 78 AJIL 441; No. 83-7714 (2d Cir. 1984), 78 AJIL 899; decision on rehearing pending.
- Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 78 AJIL 904; cert. denied, 105 S.Ct. 106.
- Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 78 AJIL 905; petition for rehearing denied, March 22, 1984.
- Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 78 AJIL 445; cert. denied, 104 S.Ct. 703.
- First National City Bank v. Banco para el Comercio Exterior de Cuba*, 103 S.Ct. 2591, 78 AJIL 230; reported at 462 U.S. 611.
- Immigration and Naturalization Service v. Chadha*, 103 S.Ct. 2764, 78 AJIL 226; reported at 462 U.S. 2764.

- Jackson v. The People's Republic of China*, No. 79-C-1272-E (N.D. Ala. 1984), 78 AJIL 675; reported at 550 F.Supp. 869; dismissed for lack of subject matter jurisdiction, October 26, 1984.
- McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 78 AJIL 671; cert. denied, 105 S.Ct. 243.
- O'Connell Machinery Co. v. M.V. Americana*, 566 F.Supp. 1381, 78 AJIL 449; 734 F.2d 115, 78 AJIL 897; petition for rehearing pending.
- Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 78 AJIL 900; cert. denied, 105 S.Ct. 247.
- Shanghai Power Co. v. United States*, 4 Ct. Cl. 237, 78 AJIL 678; appeal pending.
- Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 78 AJIL 668; petition for certiorari pending.

CURRENT DEVELOPMENTS

EXCHANGE BETWEEN EXPERT PANEL AND REAGAN ADMINISTRATION OFFICIALS ON NON-SEABED-MINING PROVISIONS OF LOS TREATY

United States Policy on the Law of the Sea

1.

After fifteen years of intensive effort, the nations of the world, with full participation by the United States, produced a comprehensive Convention on the Law of the Sea. In 1982, President Reagan decided that the United States would not become a party to the Convention. But formal abstention from the Convention is hardly a complete national oceans policy for the United States. Indeed, that abstention compels the United States to attend carefully to its posture, in law and policy, toward the Convention itself and to each of its many provisions on matters of major interest to the United States.

The United States dissociated itself from the Convention essentially because of disagreement with a number of its dispositions in respect of mining in the deep seabed. It has not disowned the spirit and import of the Convention as a whole, or any of its other provisions.

We believe that it is in the interest of the United States to recognize the Convention as representing the normative expression by the states of the world reflecting their common or respective interests at the end of the 20th century. Leaving aside the question of deep seabed mining, we believe that the provisions of the Convention achieve a workable regime that would promote order at sea and satisfy the complex of competing interests of different states.

Deep seabed mining is still a distant prospect and is of little present economic value. U.S. reservations as to the regime for deep seabed mining should be the subject of continued negotiation; they should not undermine the profound and wide consensus that has been achieved otherwise. Acceptance by the United States of the Convention, and of its dispositions generally, in fact if not in form, is in the interest of the United States and of mankind.

2.

Until well into this century the law of the sea was stable and generally agreed. Its essential principle was the freedom of the seas, which implied freedom of navigation, both civil and military, and freedom to take the sea's resources, essentially its fish. The exception to freedom for all was a small territorial sea in which coastal states exercised exclusive rights, subject to a right of innocent passage for vessels of other states.

The history of the law of the sea in the past half century is a history of coastal-state expansion. The United States took a large step in that

direction in 1945 when it claimed the mineral resources of the continental shelf and a special interest in fisheries conservation beyond its territorial sea. Ever more firmly, other states began to claim ever larger zones of exclusive fishing rights, sometimes larger zones of exclusive economic rights generally, or even large territorial seas.

The once clear and stable law of the sea became unclear and unstable. Coastal states became less restrained about asserting the right to control more activities of foreign vessels and foreign nationals in areas extending ever farther from their shores. Because the maritime powers themselves took part in this expansionist trend, limiting certain freedoms off their coasts as it suited their interests, it became increasingly difficult for them to explain why any other coastal state could not restrict high seas freedoms of interest to the maritime powers to the extent it suited its interests. It became increasingly difficult to distinguish between a principled assertion of universal legal rights by the maritime powers and an attempt to impose their will, in their own interests, on other coastal states. For the United States, committed to the rule of law, it became increasingly difficult and costly to do more than protest the claims of others adverse to its maritime interests.

Although publicity and prominence were given to the distant prospect of mining the deep seabed, the live issues of the law of the sea have concerned authority in coastal areas. By the end of the 1960s, pressures for change in the law of the sea generated two fundamental questions:

- (1) How much authority may a coastal state exercise, how far from its shores, for what purposes, and how much freedom is guaranteed there for other states and their nationals?

- (2) How could one achieve stable answers to that question, which would provide a legal foundation for exercising or enforcing rights and which all states are likely to accept and regard as legally binding over time?

3.

One important goal of the United States in the Third UN Conference on the Law of the Sea was to restore order and stability to the law of the sea. It sought to achieve this goal by giving primary emphasis to three principles:

- (1) The rules of the law of the sea must fairly balance the respective interests of all states, notably the competing coastal and maritime interests, in a manner that is generally acceptable.

- (2) Multilateral negotiations on the basis of consensus should replace unilateral claims of right as the principal means for determining that balance.

- (3) Compulsory dispute settlement mechanisms should be adopted to interpret, apply and enforce the balance.

The conference succeeded in resolving the fundamental questions of the law of the sea in accordance with these three principles.

4.

The most important question of oceans policy facing the United States is whether we will conform our behavior to that consensus. President Reagan, while rejecting the Convention on the Law of the Sea because of its system of regulating deep seabed mining, expressly recognized that the balance of interests achieved in the Convention in respect of coastal areas was in the interests of the United States and the international community as a whole. He announced that the United States would act in the future in a manner consistent with that balance.

It is of paramount importance that the United States scrupulously conform its behavior to the provisions of the Convention. Our rejection of the deep seabed mining portion of the Convention in itself inevitably tempts other states to think in terms of rejecting or making exceptions to other provisions. However, the deep seabed mining system is not relevant as such to the fundamental issues of coastal state rights and high seas freedoms in coastal areas. (Nor is substantial mining beyond the economic zone and continental shelf likely in the near future.) But virtually all of the other provisions of the Convention deal directly or indirectly with those fundamental issues.

If the United States begins to carve out exceptions to those provisions for itself, it may undo the balance and encourage other unilateral exceptions. If the U.S. Government makes exceptions for itself, it will inevitably be less effective in persuading other governments that they may not carve out other exceptions that suit them, and will be increasingly less effective in persuading the American people and America's allies that decisive action is needed to ensure respect for our legal rights off foreign coasts. We will lose both an acceptable balance of rights and duties and a unique opportunity to stabilize that balance around a set of rules worked out by consensus of all the nations of the world. The new opportunity for building a universal "customary law" around the rules described by the Convention will disintegrate. Instead, there will be strong impetus for development of different rules that will entail restriction on freedom of navigation and overflights and the conduct of military activities in vast coastal areas, restrictions which are not in the interest of the United States.

5.

The only realistic hope for building a stable and acceptable "customary law" of coastal state rights and duties at this time depends on the United States respecting all the relevant rules of the new Convention and persuading others to do the same. Unless we do so, we will increasingly face three expensive choices with respect to any foreign state's claim of control over our navigation or military activities off its coast:

- (1) *resistance*, with the potential for prejudice to other U.S. interests in that coastal state, for confrontation or violence, and for domestic discord;

(2) *acquiescence*, leading inevitably to a weakening of our position of principle with respect to other coastal states (verbal protests to the contrary notwithstanding) and domestic pressures to emulate the contested claims; or

(3) *bilateral negotiation*, in which we will be expected to offer a political, economic or military quid pro quo in proportion to our interest in navigation and military activities that, under the Convention's rules, can be conducted free of such bilateral concessions. (Bilateral negotiation limited to reciprocal exchange of navigation or military privileges will not succeed since most foreign states do not have the same interest in exercising navigational and military freedoms off our coasts as we have off theirs.)

6.

We recommend the following first steps:

(1) The United States should adopt a clear and consistent policy, applicable to all organs of the U.S. Government, of adherence to all of the rules of the Convention, excluding at most only those dealing with the regulation of mining by the International Sea-Bed Authority. The United States need not exercise all its rights (e.g., it need not extend its territorial sea or require consent for scientific research in its economic zone if it prefers not to), but it must scrupulously respect all its duties, including the limitations on its rights.

(2) The United States should encourage and urge other states, including its allies, to do the same.

(3) Means should be sought to make compulsory dispute settlement an effective part of our policy and that of other nations, binding at least on the basic issues of navigation and pollution.

PANEL ON THE LAW OF OCEAN USES*

June 13, 1984

Dear Louis:

Secretary Weinberger has asked me to respond to your letter of May 25, 1984 with the attached statement from your Panel concerning United States Policy on the Law of the Sea. Several matters are raised by the Panel which I feel merit comment.

The Panel recommends three "first steps":

(1) "The United States should adopt a clear and consistent policy, applicable to all organs of the U.S. Government, of adherence to all

* The Panel on the Law of Ocean Uses is an independent group of specialists in oceans law and policy sponsored by Citizens for Ocean Law. Its members are: Gordon L. Becker, Jonathan I. Charney, Thomas A. Clingan, Jr., John Lawrence Hargrove, Louis Henkin, Ann L. Hollick, Jon L. Jacobson, Terry L. Leitzell, Edward Miles, J. Daniel Nyhart, Bernard H. Oxman, Giulio Pontecorvo, Horace B. Robertson, Jr., J. T. Smith and Louis B. Sohn. This statement was adopted on April 27, 1984.

of the rules of the Convention, excluding at most only those dealing with the regulation of mining by the International Sea-Bed Authority. The United States need not exercise all its rights (e.g., it need not extend its territorial sea or require consent for scientific research in its economic zone if it prefers not to), but it must scrupulously respect all its duties, including the limitations on its rights."

My comments in this respect are the following:

(a) In our view the President's Ocean Policy Statement of 10 March 1983 is the clearest and most consistent statement of U.S. oceans policy in recent history.

(b) I am unaware of any instance since 10 March 1983 where an element of the Executive Branch has acted at variance with either the letter or the spirit of the President's Ocean Policy Statement or the EEZ Proclamation.

(c) Are you aware of any instance, outside of the deep seabed mining area, where in your view the U.S. Government has acted or reacted differently to a problem under the Presidential Proclamation and Ocean Policy Statement of 10 March 1983 than it would have acted had the United States signed the 1982 Convention in December of 1982? In this connection, it is my understanding that the present U.S. positions on tuna and maritime boundaries are long-standing and the U.S. interpretation of the appropriate LOS Convention articles has always been consistent with those positions.

(2) "The United States should encourage and urge other states, including its allies, to do the same."

I agree concerning navigational issues; and the government is doing so.

(3) "Means should be sought to make compulsory dispute settlement an effective part of our policy and that of other nations, binding at least on the basic issues of navigation and pollution."

Even if a policy choice were made to adopt this approach, does your Panel have any suggestions as to how this might be effectively accomplished in a technical sense?

Again, thank you for forwarding the Panel's statement. It is always interesting to hear from such a highly respected group of specialists.

FRED C. IKLÉ

Under Secretary of Defense

June 29, 1984

Dear Professor Henkin:

I have been asked to respond to your letters of May 25, 1984 to the President and to the Secretary of State forwarding the statement of the Panel on the Law of Ocean Uses of the Citizens for Ocean Law. I welcome the views of the Panel and appreciate your support of U.S. ocean policy.

Having read Under Secretary of Defense Fred Iklé's letter in response to your Report, I must say that I strongly concur with his views. In

particular, I believe that the first step recommended by the Panel has already been fully accomplished by the President's Ocean Policy Statement and Exclusive Economic Zone Proclamation of 10 March 1983. The second step recommended by the Panel—that of encouraging other States to adopt corresponding policies—is being actively pursued.

With respect to the third step recommended by the Panel, I would reiterate the question posed by Dr. Iklé: in a technical sense, how might compulsory dispute settlement with respect to navigation and pollution be accomplished should there be a policy decision to adopt such an approach?

Once again, I appreciate receiving the thoughtful views of the Panel on the Law of Ocean Uses and thank you for bringing these views to my attention.

JAMES L. MALONE
Special Representative of the President for the Law of the Sea
U.S. Department of State

August 17, 1984

Dear Fred:

I was pleased to receive your letter of June 13, 1984 about our Panel Statement on U.S. Policy on the Law of the Sea. We had intended the statement as an encouragement to the administration in its decision to accept the rules of the 1982 Law of the Sea Convention (excluding those on deep seabed mining).

Our concerns lie with the future. We fear that our failure to sign the Convention has left the impression in some quarters that U.S. actions need not consider the Convention. We view our April 27 statement as a blueprint for future action, which we believe—and you confirm—is consistent with administration policy.

Here are some of the reasons for our concerns and some examples of potential danger:

(1) The President's Proclamation of March 10, 1983 and his accompanying statement do not explicitly commit the United States to consistency with the Convention in all areas of oceans policy. The statement refers explicitly only to navigation and overflight and is vague with respect to other nonseabed issues. We believe that the Proclamation and statement *should* be read as meaning that U.S. policy should be consistent with the Convention in all respects (except with respect to deep seabed mining). It would be desirable that that be made clear and explicit in an appropriate memorandum or directive addressed to all concerned.

(2) The legislation introduced in Congress on March 10 and March 11, 1983 to implement an exclusive economic zone, etc. (S. 750/H.R. 2061) was not fully consistent with the LOS Convention provisions on the subjects covered, nor with the President's Proclamation and oceans policy statement.

(3) The notice of jurisdiction on the outer continental shelf (ocs) in the Federal Register on December 8, 1982 (Vol. 47, 236), by the Minerals Management Service of the Department of the Interior,

addressed an issue of policy prior to consideration and agreement among U.S. Government agencies. The definition of the outer limit of the ocs in the DOI notice was based on the 1958 Geneva Convention on the Continental Shelf, not on the 1982 LOS Convention. To my knowledge, there has been no clear enunciation of U.S. policy that the legal ocs extends to 200 n.m.

(4) The U.S. Government has successfully argued that courts should not void drug-smuggling arrests on the high seas on the ground that they violated the law of the sea. See, e.g., *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). Although that case antedates the conclusion of the Convention, it seems that the Coast Guard and the Drug Enforcement Administration continue to make arrests in violation of the law of the sea, and the Department of Justice would continue to argue that the 1982 Convention is not law in the United States to be honored by the courts.

(5) It is difficult to square the administration's policy on tuna and on anadromous species with the provisions of the 1982 Convention. That our policy may be long-standing does not seem relevant; if we are to act consistently with the Convention, we may have to change some old policies, as we would have had to do if we had formally adhered to the Convention. Similarly, our 1978 Port Safety and Tank Vessel Safety Act may not be fully consistent with what is in effect the LOS Convention's requirement that coastal state regulations conform to MARPOL, the IMO Convention for the Prevention of Pollution from Ships.

What is needed, we believe, is a firm and clear presidential directive to all departments and agencies, and a firm and clear communication by the President to Congress, that it is U.S. policy to conform to the Convention in all respects (other than deep seabed mining). The President should assure that the review of relevant legislation and regulations, which I understand is now in progress, will lead to any amendments necessary to assure conformity with the Convention. The United States should also be encouraging other states to abide by the Convention in all respects (other than deep seabed mining) so as to support and develop its status as reflecting customary law. We would welcome the initiative and cooperation of DOD to those ends.

Our panel is exploring means to effect compulsory dispute settlement apart from the Convention and will be happy to share our thoughts with you as our work progresses. The panel is also preparing policy papers on specific issues—on navigation, overflight and other high seas freedoms in the exclusive economic zone, on the continental shelf and deep seabed mining, and on the need of a coordinated national oceans policy.

LOUIS HENKIN

Chairman, Panel on the Law of Ocean Uses

September 10, 1984

Dear Louis:

Thank you for your follow-on letter of August 17, 1984, which highlights a position that we both share: the need for a consistent oceans

policy, based on the principles of law articulated in the non-seabed mining provisions of the 1982 Law of the Sea Convention.

As I'm sure you are aware, the recent N.A.C.O.A. report on the Exclusive Economic Zone reemphasized this need for consistency. DoD input to that report echoed that theme.

We are all working for the same objective—maritime stability—and we are in full agreement that the best way to achieve that objective is to reinforce the customary international law status of the Convention's non-seabed mining provisions. As President Reagan stated in July of 1982, the careful balance of coastal and flag state rights reflected in those provisions serves well the interests of all nations.

I look forward to receiving copies of your Panel's policy papers as they become available.

FRED C. IKLÉ

LINKAGES BETWEEN INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW

While many law schools now offer separate courses or seminars on international human rights law, the number of students exposed to such specialized study remains relatively small.¹ Human rights law is relevant to many other segments of the law school curriculum—in particular, to courses on constitutional law and individual rights—although little scholarly attention has been devoted to date to integrating appropriate human rights issues into the “bread and butter” courses that all law students take. To begin to address this lacuna, the Procedural Aspects of International Law (PAIL) Institute has undertaken to develop a human rights component or module designed to supplement leading constitutional law course books and present methods of teaching constitutional law.

Draft materials prepared by the Institute and the general topic of “Linkages between International Human Rights and U.S. Constitutional Law” were discussed at a small conference of constitutional and international law course-book editors and professors held in Washington, D.C., on September 23–24, 1983.²

The first of three sessions considered the role of international human rights law in domestic courts from both a contemporary and a historical perspective. One of the undersigned, Richard B. Lillich, offered an overview of the contemporary status of international law in United States courts, referring to the treaty power set forth in Article VI, section 2 of the U.S. Constitution and the place of customary international law (the content and impact of which were topics of discussion throughout the

¹ See Lillich, *The Teaching of International Human Rights Law in U.S. Law Schools*, 77 AJIL 863 (1983).

² The preparation of the materials and convening of the conference were made possible by grants to the Institute from the Ford Foundation, the Jacob Blaustein Institute for the Advancement of Human Rights, the Exxon Education Fund and the Dana Fund for International and Comparative Legal Studies.

conference). He noted that not only were the self-executing provisions of ratified treaties binding on the courts, but also customary international law.³ In addition, international human rights norms of both types could be used as persuasive evidence to inform or influence the definition of U.S. constitutional norms.⁴

Bert B. Lockwood, Jr., then presented a paper on "The United Nations Charter and the Courts," which considered the impact of the Charter on seminal U.S. decisions of the late 1940s and early 1950s.⁵ On the basis of research into briefs and arguments in such cases as *Oyama v. California*,⁶ *Takahashi v. Fish & Game Commission*,⁷ *Shelley v. Kraemer*⁸ and *Bolling v. Sharpe*,⁹ and other sources, Lockwood concluded that the Charter had a significant impact on the interpretation of constitutional provisions by federal and state courts, even though it was rarely cited in their decisions. The failure to rely explicitly on the Charter was explained by judicial reluctance to admit a greater role for international law, which was to some extent beyond the control of the United States, as well as then prevalent U.S. political realities such as isolationism and the defense of racial segregation.

These presentations engendered a lively debate about the actual and appropriate role of international law in constitutional decision making. Not all participants believed that even the early influence of the Charter had been sufficiently proved, and some participants questioned whether utilization of international human rights norms necessarily would result in greater protection for individual rights. In the area of freedom of speech, for example, it was generally agreed that U.S. constitutional rights were broader than similar protections provided under international law. On the other hand, it was noted that *Reid v. Covert*¹⁰ established the principle that constitutional rights could not be diminished by treaty, so that international law would be used to expand protections or fill gaps left in U.S. law rather than to restrict existing rights.

It was suggested that international human rights norms might be relevant in litigation that has an impact on international concerns, such as cases involving aliens, but that they were less likely to be helpful in cases involving only domestic concerns. While explicit constitutional norms such as equal protection and due process might be informed by international law, one participant thought it inappropriate either to fill constitutional "gaps" or to develop less well defined rights (such as under the Ninth

³ Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOKLYN J. INT'L L. 289 (1982).

⁴ See Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Christenson, *The Use of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981).

⁵ The final version of his paper has been published as Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

⁶ 332 U.S. 633 (1948).

⁷ 334 U.S. 410 (1948).

⁸ 334 U.S. 1 (1948).

⁹ 347 U.S. 497 (1954).

¹⁰ 354 U.S. 1 (1957).

Amendment) with international concepts. In response, it was suggested that discrimination on the grounds of race, sex or alienage did involve the international image and obligations of the United States and that developing international human rights law could be most helpful in interpreting dynamic constitutional rights.

Several participants noted that the courts still were reluctant to utilize international law in a significant manner. In two recent cases concerning discrimination in the provision of free elementary education to undocumented alien children¹¹ and racial discrimination by tax-exempt religious schools,¹² the U.S. Supreme Court had not considered international law, though international norms were relevant. On the other hand, international human rights norms were applied by lower courts in the cases of *Filartiga v. Pena-Irala*¹³ and *Rodriguez-Fernandez v. Wilkinson*.¹⁴

Discussions during the second session continued to focus on the substantive and procedural relationship between international human rights and constitutional law. The *Filartiga* and *Rodriguez-Fernandez* cases were examined, and the suggestion made that a clearer distinction needed to be drawn between the binding and informative roles of international law. Gordon A. Christenson summarized his thesis¹⁵ that international norms might be particularly relevant to equal protection analyses, as courts attempt to decide the appropriate level of scrutiny that should be applied to allegedly unconstitutional discrimination.

It was stated that *Rodriguez-Fernandez* could be distinguished as a case involving a person theoretically outside the jurisdiction of the United States, which made the use of international law appropriate. There was no statutory provision squarely in point and, even under the reasoning of the district court, international law did not override federal law but rather took precedence over an executive order for the plaintiff's continued detention.

Concern was expressed by some participants over the supposedly vague nature of international human rights law, in particular, customary international law norms. It was agreed that proving customary international law was a difficult task. An examination of state practice and *opinio juris* was necessary,¹⁶ and customary international law was probably less important than suggested by some human rights advocates. Reference was made to Tentative Draft No. 3 of the *Restatement of the Foreign Relations Law of the United States (Revised)*, which identifies genocide, slavery, prolonged arbitrary detention, causing the murder or disappearance of individuals,

¹¹ *Plyler v. Doe*, 476 U.S. 202 (1982).

¹² *Bob Jones Univ. v. United States*, 103 S.Ct. 2017 (1983).

¹³ 630 F.2d 876 (2d Cir. 1980). Compare *Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981), *aff'd per curiam*, 726 F.2d 774 (D.C. Cir. 1984).

¹⁴ *Fernandez v. Wilkinson*, 505 F.Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

¹⁵ Developed in his two articles cited in note 4 *supra*.

¹⁶ See, e.g., Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 635 (1983).

torture or other cruel, inhuman or degrading treatment or punishment, systematic racial discrimination and consistent patterns of gross violations of internationally recognized human rights as violations of customary international law.¹⁷ Other possible violations of international human rights law such as sex discrimination were not thought to rise to the level of customary international law, although there was disagreement as to whether the draft *Restatement* could be considered authoritative on this issue.

The self-executing nature of human rights treaties, few of which have been ratified by the United States, also was discussed. The shift in modern treaties from narrowly focused bilateral treaties concerned with external affairs to much broader multilateral instruments with domestic impact was noted. One participant stated that the latter almost always are regarded as non-self-executing.¹⁸ The wide-ranging nature of these treaties also gives rise to numerous reservations, in order not to disturb the domestic order unduly. Nevertheless, ratification still retains symbolic significance and entails international obligations. Other participants thought that ratified human rights treaties should be as easily enforceable in U.S. courts as other international agreements.

While the participants disagreed about the present impact and binding effect of international human rights law on individual rights litigation in the United States, there was greater agreement on the helpful comparative role that it could play in both teaching and submissions to courts. It was observed that Canadian courts were much more likely to look at international law from a comparative perspective, i.e., to consider how other national courts have interpreted the same or similar provisions. The greater impact of European human rights jurisprudence, which is often more legalistic and reasoned than the decisions of other international bodies, also was noted.

The third and final session was devoted to specific pedagogical issues raised by the introduction of international human rights law into the existing constitutional framework. There was a general consensus that the major obstacles to the introduction or integration of international materials are (1) a lack of time (several participants noted that the basic constitutional law course already excludes many important issues and that it would be difficult to add new material); (2) the lack of direct or demonstrated relevance of international human rights law to decision making by the Supreme Court, which is the almost exclusive focus of most constitutional law courses; and (3) the difficulty of preparing materials narrow enough to be useful with respect to a particular issue (e.g., freedom of speech), yet comprehensive enough to enable constitutional law professors to feel reasonably comfortable with their own knowledge of the topic.

¹⁷ RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 (Tent. Draft No. 3, 1982).

¹⁸ Cf. *United States v. Postal*, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979); *People of Saipan ex rel. Guerrero v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975). See Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AJIL 892 (1980).

Several participants noted that they did use international materials and examples in their own constitutional law courses, but that they did so out of personal interest and expertise, which mitigated at least the third problem mentioned above. Other participants emphasized the time problem, noting that even broad areas such as the treaty power under the Constitution receive at best cursory treatment. One participant questioned whether allotting more time to international human rights would not overemphasize its significance.

Most participants believed that a comparative approach that considered only a few substantive rights in some detail was pedagogically preferable to the more general and comprehensive draft materials prepared by the institute for the conference. Among the specific suggestions for materials that would be most helpful were the preparation of excerpts of major European cases that could be compared with corresponding U.S. cases; the focusing of materials on the substantive areas of the First Amendment, the right to privacy and equal protection; and the development of materials appropriate to interdisciplinary or undergraduate courses.

Other recommendations for education in this area were to offer a 3- to 6-week summer workshop on international law for constitutional law professors, perhaps also with some student participation; to provide more effective and active clinical programs in international human rights law; and to reinforce the teaching of private international law as a means of dealing with some of the issues related to treaties.

* * * *

Despite the international implications of many recent federal court cases,¹⁹ the growth of the international law of human rights, and the Supreme Court's celebrated injunction that "international law is part of our law,"²⁰ the PAIL Institute conference highlights the gap that remains between international and constitutional scholars. There seems to be strong intellectual interest in bridging this gap, particularly among those participants who specialize in individual rights. At the same time, candor requires internationalists to recognize that international human rights law has not yet become a significant (or indeed, more than a marginal) factor in constitutional decision making in the minds of most constitutional lawyers, although the number of practitioners employing international law arguments in the courts is steadily increasing.

The two major barriers to a fuller integration of international human rights law into constitutional law courses are lack of knowledge and time. The conference itself and the revised materials subsequently prepared by the Institute and now available for classroom use²¹ have begun to address

¹⁹ See, e.g., *Plyler v. Doe*, 476 U.S. 202 (1982); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Haig v. Agee*, 453 U.S. 289 (1981).

²⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²¹ The revised materials have been published as *Materials on International Human Rights and U.S. Constitutional Law* (H. Hannum ed. 1985). Included are extracts from significant decisions of the European Commission and Court of Human Rights, the Inter-American

the former, and several participants indicated that some of the human rights issues raised during the two days of discussions would be likely to appear in some form in their own courses. While time pressures may prevent more than passing reference to international human rights law in most constitutional law courses, closing the knowledge gap should contribute significantly to the insertion of international concerns by individual professors according to their own particular interests. Whether these concerns are addressed comparatively or in the context of defining substantive constitutional rights, the intellectual and legal perspective gained may broaden the too often narrow presentation of constitutional law and rights now received by many students.

RICHARD B. LILlich AND HURST HANNUM*

THE MOON TREATY ENTERS INTO FORCE

On July 11, 1984, the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies¹ entered into force following the deposit with the Secretary-General of the United Nations of the fifth instrument of ratification. The Agreement, following its adoption by the General Assembly, was opened for signature on December 18, 1979. In the intervening years, it has been signed by Austria, Chile, France, Guatemala, India, Morocco, the Netherlands, Peru, the Philippines, Romania and Uruguay. The fifth state to deposit its ratification was Austria, which followed Chile, the Philippines, Uruguay and the Netherlands.

Unlike the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies² and the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space,³ the Moon Agreement did not require acceptance by the United States, the Soviet Union and the United Kingdom in order to enter into force.

The long delay and the limited number of ratifying states contrast sharply with the status of the other international space law agreements produced at the United Nations. At present, with China's accession in 1983 to the 1967 Principles Treaty, there are 85 states bound by that agreement, 78 by the Rescue and Return Agreement, 69 by the 1972 Convention on the International Liability for Damage Caused by Space

Commission on Human Rights and the UN Human Rights Committee. They are available at cost from the PAIL Institute, 1346 Connecticut Avenue, N.W., Suite 1027, Washington, D.C. 20036.

* Of the Board of Editors, and Executive Director, Procedural Aspects of International Law Institute, respectively.

¹ GA Res. 34/68 (Dec. 5, 1979), *reprinted in* 18 ILM 1434 (1979).

² *Done* Jan. 27, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 205.

³ *Done* Apr. 22, 1968, 19 UST 7570, TIAS No. 6599, 672 UNTS 119.

Objects⁴ and 34 by the 1975 Convention on Registration of Objects Launched into Outer Space.⁵

The 1979 Moon Agreement, which was comprehensively negotiated between 1970 and 1979, reemphasizes some of the basic provisions contained in the 1967 Principles Treaty. It also augments that agreement in several instances, such as by defining the moon to include orbits around or other trajectories to or around it. The demilitarization provisions of the Principles Treaty are enlarged by providing, for example, that threats or use of force may not take place on the moon relating to the Earth, the moon, spacecraft, the personnel of spacecraft or man-made objects. Wider prohibitions against the use of nuclear weapons or weapons of mass destruction than appear in the 1967 Treaty were adopted.

Freedom of scientific investigation is emphasized in several articles. Explorers are specifically authorized to collect and remove from the moon samples of minerals and other substances. Moon rocks and other substances may be used in quantities appropriate to the support of national missions. International scientific preserves are contemplated.

Space stations may be established on the moon. The states parties retain jurisdiction and control over their personnel and physical objects and are required to provide notice of accidents in certain circumstances. Moon activities may be engaged in by juridical and natural persons, including "non-governmental" entities.

Inspections by all states parties to the Agreement, following advance notice of projected visits, are authorized. The Agreement encourages consultations among parties and sets forth procedures for dispute settlement. It also permits international intergovernmental organizations to become parties. The rights and duties conferred by the Agreement are limited to the parties. Finally, review procedures are established.

Several reasons have been advanced for the delay in the entry into force of the Agreement. The Third World forces that influenced some of the terms of the 1982 Law of the Sea Convention were heard from during the Moon Agreement debates as well. For example, at one time, representatives of developing countries urged the imposition of a moratorium on the exploration, exploitation and use of the moon's resources. This proposal was deflected by incorporating the principle of *res communis* into Article 11 of the Agreement. This article also allows the harvesting of the natural resources of the moon through their removal from their "in place" location. Paragraph 2 of Article 11, like the Principles Treaty, provides that "[t]he moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means."

Article 11, while accepting the *res communis* principle, looks beyond this approach. A unique provision, which seeks to distance the common heritage of mankind principle of Article 11 from the same expression in Article 136 of the Law of the Sea Convention, states that "[t]he moon

⁴ Done Mar. 29, 1972, 24 UST 2389, TIAS No. 7762.

⁵ Done Jan. 14, 1975, 28 UST 695, TIAS No. 8480.

and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article." This latter formulation was duly noted by the International Law Section of the American Bar Association (ABA) in 1981 when it stressed that the ocean and space uses of the expression were not the same. The members of the section concluded that the formulation of the Moon Agreement was unique and could not be used or interpreted "in any other context."⁶

To secure the ultimate implementation of the common heritage principle,⁷ paragraph 5 of Article 11 and Article 18 authorize states parties to the Agreement to establish "an international régime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible."

Paragraph 7 of Article 11 identifies the main purposes of the proposed international regime. They include the orderly and safe development of the natural resources of the moon, the rational management of those resources and the expansion of opportunities in the use of those resources. A further purpose that caused some debate calls for "[a]n equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration." Much was made of the fact during the negotiations, and subsequently, that this provision requires an "equitable," but not an "equal," sharing of potential benefits.

The opponents of the Moon Agreement have suggested that the common heritage provision might be inconsistent with the critical terms of Article 1 of the 1967 Principles Treaty, which provides that the space environment (outer space per se, the moon and other celestial bodies) and its natural resources may be freely and equally explored, exploited and used by all states and that they are to have free access to these areas and resources. The International Law Section has responded that the common heritage principle was adopted in concert with the recognition that

(i) all States have equal rights to explore and use the Moon and its natural resources, and (ii) that no State or other entity has an exclusive right of ownership, property, or appropriation over the Moon, over any area of the surface or subsurface of the Moon, or over its natural resources in place.⁸

Opponents have also suggested that the common heritage principle might cause a state to lose jurisdiction and control over national space

⁶ Section of International Law, Report to the ABA House of Delegates 10 (1980) [hereinafter cited as International Law Section Report], reprinted in *The Moon Treaty: Hearings Before the Subcomm. on Science, Technology and Space of the Senate Comm. on Commerce, Science and Transportation* [hereinafter cited as *Senate Hearings*], 96th Cong., 2d Sess. 76, 78 (1980).

⁷ Article 18 of the Agreement characterizes the common heritage of mankind as a principle.

⁸ International Law Section Report, *supra* note 6, at 76.

objects and personnel while in space, despite contrary language in Article 8 of the 1967 Principles Treaty. The International Law Section replied to this fear by citing Articles 12 and 15 of the Moon Agreement, which state that the presence of national space objects and personnel on the moon does not affect the jurisdiction, control and ownership of the state in question.⁹

These doubts of the critics stemmed from their basic argument that the Agreement made inroads on the free enterprise system. Yet both the language and the negotiating history of the Agreement are consonant with and protective of the interests of private entrepreneurs. For this reason, the members of the section concluded that the Agreement assures that the parties to it "retain exclusive jurisdiction and control over their facilities, stations and installations on the Moon, and that other States Parties are obligated to avoid interference with normal operations of such facilities."¹⁰ The present *res communis* rights of those who are able to engage in the exploration, exploitation and use of the area and its resources are fully recognized.

The ABA's Section of Natural Resources Law initially raised objections about the terms and purpose of the Moon Agreement. Its members feared that acceptance of the common heritage principle might prejudice the then current negotiations on the law of the sea, as well as the future of Antarctica. They believed that the provisions of Article 11(5), relating to a future international legal regime and appropriate procedures for implementing it, would impose unacceptable "control [on] U.S. space investigations."¹¹ The section also urged that "a moratorium on exploration and exploitation of space resources is inherent in the Moon Treaty, pending establishment of machinery to govern such activities under the control of the international regime."¹² This proposition was contrary to the position taken by the United States during the negotiations. The United States had indicated that the Agreement "places no moratorium upon the exploitation of the natural resources on celestial bodies, pending the establishment of an international regime."¹³ In an immediate response, the Soviet representative raised no objections to the interpretation put forward by the United States.¹⁴

In 1981 leaders of the ABA sections prepared a consolidated recommendation to the ABA House of Delegates.¹⁵ They accepted the views

⁹ *Id.* at 80.

¹⁰ *Id.* at 76.

¹¹ Section of Natural Resources Law, Report with Recommendation to the ABA House of Delegates, reprinted in *Senate Hearings*, *supra* note 6, at 82, 85.

¹² *Id.*

¹³ UN Doc. A/AC.105/PV.203, at 23-25 (1979).

¹⁴ *Id.* at 43-45. For an assessment of the unsuccessful efforts of the less-developed countries to obtain support for their moratorium proposals, see Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 14 INT'L LAW. 429, 466-74 (1980).

¹⁵ Recommendation to the House of Delegates (1982), reprinted in Christol, *The American Bar Association and the Moon Treaty*, 9 J. SPACE L. 77, 90 (1981).

contained in the report of the International Law Section, with modest changes in terminology, and deferred to the Natural Resource Law Section's concern about the meaning to be accorded to the common heritage principle. Thus, while the sections recognized that the moon and its natural resources are the common heritage of mankind, they concluded that

- (i) all States have the rights to explore and use the Moon and its natural resources, and (ii) that no State or other entity has an exclusive right of ownership over the Moon, over any area of the surface or subsurface of the Moon, or over its natural resources which have not been, or are not actually in the process of being, extracted or used by actual development activities on the Moon.¹⁶

This language was intended to make certain that property rights appertain to any juridical or natural person that comes into possession of a moon-based natural resource by removing that resource from its original "in place" position. The statement was designed to ensure that the common heritage principle would not thwart the free enterprise opportunities of firms prior to the time, undoubtedly remote, when the international regime and the "appropriate procedures" provisions of Article 11(5) were implemented. That such exploitation was considered by the framers of the Agreement to be a distant event was evidenced by the phrase in Article 11(5) "as such exploitation is about to become feasible."

Although Soviet experts have speculated recently whether the "appropriate procedures" clause might lead to the formation of a supranational governmental body, it is clear that despite early criticisms of the Agreement by Soviet negotiators, it was accepted and endorsed by the Soviet Union. Further, since only the parties to the Agreement will have a hand in creating the new moon organization, it will be up to them to identify its powers and duties. Only after they have done so will it be possible to determine whether the new institution is endowed with the traditional functions of international intergovernmental organizations, or whether the moon organization is quite unique.

The Agreement provides for an orderly transition from the limited resource exploitation of recent years to something more grandiose at a future date. At the moment, the rule is that of freedom of exploitation by all pursuant to the *res communis* principle. When exploitation on a large-scale basis is feasible, an international legal regime will become necessary; it will be created by the parties to the Agreement to support the newly activated common heritage principle. Only they will be allowed to effect distributions of benefits on an equitable basis, taking into account the interests and needs of the less-developed countries, as well as the efforts of the states engaged in space exploitation.

While the novelty of the common heritage principle may have produced some concerns in the United States, undoubtedly much influenced by present uncertainties about how the sharing of benefits may work out in

¹⁶ *Id.* at 91.

practice, no such concerns were expressed by one group of experts whose members are not based in less-developed countries. In 1982 the Space Law Committee of the International Law Association urged the early ratification of the Agreement.¹⁷

Although both nations supported the Agreement at the United Nations in 1979, neither the Soviet Union nor the United States has formally approved it. By contrast, both are parties to the four other UN-negotiated international space law agreements. Perhaps the 1979 Agreement, like other international agreements designed to serve the reciprocal necessities of these two states, has become a casualty of the important differences that now separate the countries. These differences are most noticeable in the areas of arms control and disarmament, and the Moon Agreement does contain an important limitation on the threat or use of force on and around the moon.

Aside from the detriment to the national interests of the United States caused by the absence of a truly effective and verifiable general system of arms control and disarmament, can the nonratification of the Moon Agreement cause injury to the commercial interests of this country? The parties to the Agreement are accorded basic exploitative rights that are not accorded to nonparties. While only France, among the present parties, can be considered as having space capabilities, such capabilities are not necessary for a state to be able to profit from adoption of the Agreement. National entrepreneurs are already looking for flag-of-convenience countries as bases for communications and remote sensing activities.

One of the parties to the Agreement could conceivably enter into arrangements with a foreign private firm that has launch and operational capabilities. While such arrangements may not be made soon, or at all, the entry into force of the Moon Agreement may still indicate that the United States would be well-advised to make a hardheaded appraisal of what may be gained or lost from not ratifying it.

CARL Q. CHRISTOL*

THE 1984 UN SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

This past August, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities welcomed 17 newly elected experts. In part, because of the large number of new members on the Sub-Commission, the session did not produce many major initiatives.

The 26 members of the Sub-Commission are elected by the Commission on Human Rights every three years, with due respect given to geographic

¹⁷ INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE, 1982, at 12 (1983).

* Professor of International Law and Political Science, University of Southern California.

representation.¹ This year, for the first time, the alternate for each expert was elected together with the expert, which represented a major reform over the previous practice. Formerly, elected experts could designate their alternates; the alternate would frequently be a government official in Geneva of the same nationality as the expert.² Nineteen alternates were elected by the Commission,³ and several actively participated in this year's session.⁴ Procedures are needed, however, to ensure that no team of experts has an extra opportunity to intervene on a particular agenda item simply because both the expert and the alternate happen to be present.⁵

Violations of Human Rights in Specific Countries

The Sub-Commission considers instances of human rights violations in specific countries in three ways: (1) under the procedure established by Economic and Social Council (ECOSOC) Resolution 1503;⁶ (2) under the specific agenda item authorized by ECOSOC Resolution 1235;⁷ and (3) under a general agenda item where violations in a specific country are used to illustrate or highlight a problem covered by the agenda item.

The Working Group on Communications, established pursuant to ECOSOC Resolution 1503, considered hundreds of petitions submitted to the United Nations alleging human rights violations in specific countries.⁸ Because the working group, Sub-Commission and Commission consider

¹ In general, member countries of the United Nations are divided into the following five geographic areas: (1) Africa, (2) Asia, (3) Eastern Europe, (4) Latin America, and (5) Western Europe, the United States, Canada, Australia and New Zealand. On the Sub-Commission there are seven African experts, five Asian experts, three Eastern European experts, five Latin American experts and six experts from Western Europe and other countries. On each of the Sub-Commission's working groups, there is one expert from each of the geographic areas. UN Doc. E/CN.4/Sub.2/1984/Misc.2.

² See, e.g., Gardeniers, Hannum & Kruger, *The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Recent Developments*, 4 HUM. RTS. Q. 353, 357 n.20 (1982).

³ A country nominating an expert to serve on the Sub-Commission was not required to nominate an alternate. See UN Doc. E/CN.4/Sub.2/1984/Misc.2.

⁴ The alternate from Argentina replaced the expert nominated by his country for the entire session, served as rapporteur for the Sub-Commission, participated actively in the session and was assigned to prepare two reports. Other alternates who participated frequently were those from the United States and the Soviet Union.

⁵ Under one agenda item at this year's session, the alternate for the Soviet Union took the floor after the expert from the Soviet Union had already intervened under the same item. A number of experts protested, but no formal resolution of the issue was reached.

⁶ ESC Res. 1503 (XLVIII), 48 UN ESCOR Supp. (No. 1A) at 8, UN Doc. E/4832/Add.1 (1970). For a description of the 1503 procedures, see GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 60-67 (H. Hannum ed. 1984) [hereinafter cited as GUIDE].

⁷ ESC Res. 1235 (XLII), 42 UN ESCOR Supp. (No. 1) at 17, UN Doc. E/4393 (1967). For a discussion of the procedures for intervening under Resolution 1235, see GUIDE, *supra* note 6, at 186-99.

⁸ The Secretary-General is authorized to provide members of the Commission with communications or petitions alleging human rights violations pursuant to ESC Res. 728F (XXVIII), UN Doc. E/3290 (1959). The 1503 procedure was established as a means of coordinating the consideration of petitions filed with the United Nations.

1503-related matters in closed sessions, the only public source of information on these matters is the statement by the head of the Commission prior to its public debate. At its last session, the Commission named 11 countries as gross violators of human rights and dismissed three from consideration.⁹ Of the three countries dismissed, it can be assumed that petitions pertaining to Pakistan and Malaysia were later considered by the working group and the Sub-Commission. In light of the situation in these countries—particularly in Pakistan—it will be interesting to see whether the Sub-Commission forwarded either country to the Commission, and, if so, how the Commission will react.

Pursuant to ECOSOC Resolution 1235, the Sub-Commission annually devotes an agenda item to violations of human rights and fundamental freedoms. This agenda item has evolved to the point where it provides a flexible and public forum for publicizing human rights violations in specific countries. At this year's session, there was an attempt by the expert from the Soviet Union to restrict the mention of specific countries by Sub-Commission members;¹⁰ however, as in the past, both Sub-Commission members and nongovernmental organizations (NGOs)¹¹ detailed instances of violations of human rights in specific countries under this agenda item. Although dozens of countries from every region of the world were mentioned, among those receiving considerable attention were Guatemala, Indonesia (with respect to East Timor), South Africa, Sri Lanka, the Sudan and Uruguay.

At one point, members of the Sub-Commission attempted to question the Indonesian observer with respect to East Timor, following Indonesia's exercise of the right of reply.¹² After considerable wrangling over the propriety of permitting questions to be posed to a government observer,¹³ the Sub-Commission decided to permit the Indonesian observer to "clarify" his remarks in response to the questions posed. The observer, however, declined to respond, contending that the questions went beyond the scope of the Sub-Commission's authority.

⁹ See UN Doc. E/CN.4/1984/77, at 151.

¹⁰ The Soviet expert contended that when he arrived at the Sub-Commission 3 years ago there was a policy—articulated by the experts from the United States and the United Kingdom—that experts would not name specific countries as human rights violators. See UN Press Release HR/1583, Aug. 25, 1984, at 4. However, a review of the Sub-Commission's summary records failed to disclose any such policy or discussion.

¹¹ Only NGOs with consultative status with the United Nations pursuant to ESC Res. 1296 (XLIV), 44 UN ESCOR Supp. (No. 1) at 21, UN Doc. E/4548 (1968), are permitted to participate actively—i.e., through oral and written interventions—in the Sub-Commission's sessions. Over the years, the practice of permitting NGOs to raise instances of human rights violations in specific countries has developed. See, e.g., Gardeniers, Hannum & Kruger, *supra* note 2, at 358.

¹² The experts from the United Kingdom, Greece and Cuba all posed pointed questions to the Indonesian observers regarding Indonesia's recognition of various UN resolutions concerning self-determination for East Timor.

¹³ The experts from the Soviet Union and China objected to the "cross-examination" procedure as unprecedented.

In another exchange, the Soviet expert took the floor shortly after the expert from the United States had commented on the human rights situation in the Soviet Union, specifically mentioning the case of Andrei Sakharov and the situation of Soviet Jews, as typified by the case of Iosif Begun, a Hebrew teacher convicted in 1983 of slandering the Soviet state and sentenced to a 12-year prison term. In his 45-minute intervention,¹⁴ the Soviet expert first characterized the intervention by Dr. Sakharov's son-in-law on behalf of the International League for Human Rights as a sham. He then proceeded to catalog the human rights violations in the United States, mentioning in particular the case of Leonard Peltier, a Native American.¹⁵

Sub-Commission members and NGO representatives alike discussed violations by specific countries under general agenda items. Under the agenda item covering the elimination of all forms of racial discrimination, although other countries were mentioned,¹⁶ emphasis was placed on the situation in South Africa. The Sub-Commission considered an updated report by Ahmad Khalifa, which purported to identify all banks, transnational corporations and other organizations "whose activities constitute assistance to the colonial and racist regime in Southern Africa."¹⁷ Although the report—which lists close to four thousand organizations—appears comprehensive, at least two experts from Western countries criticized its failure to name organizations in non-Western countries that carry on trade with South Africa.¹⁸

Under the agenda item covering the human rights of the mentally ill, reference was made to the situation in Japanese mental hospitals. The following day, the pertinent NGO intervention was front-page news in almost every major Japanese newspaper and, within weeks, legislation was introduced to regulate the admission and treatment of mental hospital patients.¹⁹ Although Japan represents a somewhat atypical example, it illustrates how the publicity given to violations of human rights in certain countries by the Sub-Commission can provide the impetus for the improvement of a specific situation.²⁰

¹⁴ Prior to the debate under the agenda item concerning Resolution 1235, the Sub-Commission agreed that the intervention of each expert would be limited to 15 minutes. Despite two reminders from the chair, the Soviet expert continued his presentation.

¹⁵ Leonard Peltier's April 1977 conviction for killing two FBI agents on an Indian reservation in 1975 is currently under review before a U.S. district court in South Dakota.

¹⁶ For example, the situation of the Korean and Barakumin minorities in Japan. See UN Press Release HR/1570, Aug. 14, 1984, at 3.

¹⁷ UN Doc. E/CN.4/Sub.2/1984/8 and Add. 1-2.

¹⁸ See UN Press Release HR/1569, Aug. 13, 1984, at 3. See also Draft Decision, UN Doc. E/CN.4/Sub.2/1984/L.5, asking the special rapporteur to strive for geographic completeness.

¹⁹ The International League for Human Rights made the oral intervention. See *Japan's Psychiatric System*, Asahi Shimbun Evening News [English newspaper], Aug. 20, 1984; and *Psychiatry and the Breach of the International Covenant on Human Rights*, Manichi Shinbun, Aug. 19, 1984 (trans. supplied by International League for Human Rights).

²⁰ Japan has consistently responded swiftly to complaints about domestic human rights violations when raised by Western NGOs. For example, in 1980 the International Human

Indigenous Populations

The Working Group on Indigenous Populations was established in 1982. Its mandate was to develop standards pertaining to rights of indigenous populations and to review recent developments affecting indigenous populations.²¹ In its first 2 years, under the chairmanship of Asbjorn Eide, the working group adopted a flexible procedure that permitted the representatives of indigenous populations—including those without consultative status with ECOSOC²²—to participate actively in the meetings of the working group.²³

This year's working group once again provided indigenous groups from many parts of the world with an opportunity to bring to the attention of a United Nations organ the specific problems facing particular indigenous peoples. Also of note was the active participation of a number of observers from governments with large indigenous populations.²⁴ After reviewing the report of the working group, the Sub-Commission adopted a lengthy resolution requesting that the working group consider drafting a body of principles on indigenous rights, beginning at its next session.²⁵

The Sub-Commission also approved a proposal for the establishment of a voluntary fund to be used to facilitate the participation of representatives of indigenous groups in the deliberations of the working group.²⁶ The proposal would establish a five-person board of trustees, including at least one member of a widely recognized organization of indigenous people.²⁷ If established as proposed,²⁸ the fund would represent a step, albeit a minor one, in recognizing a representative of an indigenous group as an active participant in a UN-controlled body.

Rights Law Group submitted a 1503 communication concerning the Korean minority in Japan. Following the intervention, the Law Group was assured that steps would be taken to remedy the situation legislatively.

²¹ ESC Res. 1982/34, UN Doc. E/CN.4/Sub.2/1982/33, at 3.

²² See note 11 *supra*.

²³ See, e.g., reports of the Working Group on Indigenous Populations from the past 2 years. UN Docs. E/CN.4/Sub.2/1982/33, and E/CN.4/Sub.2/1983/22.

²⁴ Of particular note was the address to the working group by Clyde Holding, Australian Minister for Aboriginal Affairs. Other government representatives who participated actively in the sessions were the Canadian, Norwegian, Peruvian and Brazilian observers.

²⁵ See Res. 1984/35, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 8.

²⁶ *Id.* at 10.

²⁷ *Id.*

²⁸ The establishment of the fund must still be approved by the Commission on Human Rights and ECOSOC. The Commission authorized the Sub-Commission to consider its feasibility. See Commission on Human Rights Res. 1984/32, UN Doc. E/CN.4/1984/77, at 68. However, it remains to be seen whether the Sub-Commission's proposal, which represented a compromise between the position of indigenous groups seeking greater control of the fund and that of government representatives objecting to any acknowledgment of indigenous groups as entities recognized by the United Nations, will be adopted in its present form at the Commission's next session.

Slavery

The Slavery Working Group was established in 1974.²⁹ At this year's session, as in past years, NGOs dominated the working group's meetings, publicizing specific instances of slavery or slavery-like practices throughout the world.

Although no major initiatives emanated from the working group this session, its effectiveness was illustrated by the mission sent in January 1984 to investigate the practice of slavery in Mauritania and measures that might be taken to eradicate it.³⁰ The mission was the result of an intervention by the Anti-Slavery Society at a 1981 working group session. In his report, Marc Bossuyt, the expert designated by the Sub-Commission, concluded that the Government of Mauritania was taking steps to eliminate slavery but should be encouraged nonetheless to increase its activities in this area.³¹ He also suggested a number of concrete steps that the Government should implement to assist former slaves and others who continue living in slave-like conditions.³²

States of Emergency

Last year, pursuant to a decision of the Commission on Human Rights, the Working Group on Detention was asked to prepare a list of countries in which a state of emergency had been declared or terminated.³³ A list supplied by the United Nations Centre for Human Rights contained only countries that had informed the United Nations that they had derogated from their obligations under the International Covenant for Civil and Political Rights.³⁴ Some members of the working group expressed uncertainty about the standards that could be used to draw up a list based on less objective criteria.

The working group proposed, and the Sub-Commission agreed, that the expert from Argentina should prepare an explanatory paper on the ways and means for the future preparation of such a list.³⁵ To avoid further delay, it is hoped that the expert will also provide specific examples of countries where states of emergency are currently in effect.

²⁹ Res. 11 (XXVII) (1974), authorized by ESC Dec. 17 (LVI) (1974).

³⁰ UN Doc. E/CN.4/Sub.2/1984/23, at 2.

³¹ See UN Doc. E/CN.4/Sub.2/1984/CRP.1/Add.10, at 3.

³² UN Doc. E/CN.4/Sub.2/1984/23, at 17. For example, the expert proposed that Mauritania ratify international human rights instruments, establish an antislavery body to which victims might apply, involve former slaves to a greater extent, make greater use of the media to inform victims of their alternatives, inform the public of penalties for slave owning, and provide loans to former slaves.

³³ Commission on Human Rights Dec. 1984/104, UN Doc. E/CN.4/1984/77, at 104. The development of such a list was included as one of the major recommendations in the study on states of emergency prepared for the Sub-Commission by the then expert from France, Nicole Questiaux.

³⁴ UN Doc. E/CN.4/Sub.2/1984/WG.1/CRP.2.

³⁵ Res. 1984/27, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 5-6.

Instruments

The Working Group on Universal Acceptance of Human Rights Instruments was established in 1979 to encourage acceptance of international human rights instruments.³⁶ It was authorized to call upon governments that have not ratified various human rights instruments to explain their inaction.³⁷ Unfortunately, few governments have participated in the working group's sessions.

On the basis of the working group's report,³⁸ the Sub-Commission requested that the Secretary-General consider the possibility of offering technical assistance and designating regional advisers to facilitate the adoption of human rights instruments by more countries.³⁹ The Sub-Commission also decided to suspend the working group, and instead to appoint a member of the Sub-Commission to prepare a status report.⁴⁰ In view of the inability of the working group to involve more governments in its work, this decision is a positive one.

Studies and Reports

This year only one completed report was presented to the Sub-Commission: the Study of the Problem of Discrimination against Indigenous Populations by Mr. Martínez Cobo.⁴¹ The report, which includes several volumes, took 11 years to complete. Most of the report had been presented to the Sub-Commission in previous years, but this year the "Conclusions, Proposals and Recommendations" section was presented for the first time.⁴²

In preparing the study, Mr. Cobo, together with United Nations staff personnel, visited 37 countries to conduct on-site interviews with government officials and representatives of indigenous populations.⁴³ The Cobo study thus provides a wealth of information on indigenous populations in various countries. The conclusions, proposals and recommendations should prove useful to the Working Group on Indigenous Populations in drafting a proposed declaration or convention on the rights of indigenous populations.

The impact of the Cobo study will be limited, however, unless an edited version is prepared to facilitate its broad dissemination and use by United Nations bodies and member countries. A Sub-Commission resolution recommends that ECOSOC authorize the UN Secretary-General to prepare an edited and condensed version of the study.⁴⁴

³⁶ Res. 1979/1B (XXXII), UN Doc. E/CN.4/Sub.2/1979/L.716.

³⁷ See generally Weissbrodt, *A New United Nations Mechanism for Encouraging the Ratification of Human Rights Treaties*, 76 AJIL 418 (1982).

³⁸ UN Doc. E/CN.4/Sub.2/1984/26, at 2.

³⁹ Res. 1984/36, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 11.

⁴⁰ *Id.* at 12.

⁴¹ UN Docs. E/CN.4/Sub.2/476 and Add.1-6, E/CN.4/Sub.2 and Add.1-7, E/CN.4/Sub.2/1983/21 and Add.1-8.

⁴² UN Doc. E/CN.4/Sub.2/1983/2/Add.8. ⁴³ *Id.*

⁴⁴ Res. 1984/35, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 7.

A preliminary report on amnesty laws was discussed in great detail by the Sub-Commission.⁴⁵ The report is designed to provide a frame of reference for those endeavoring to promote amnesty in particular countries, primarily for political offenses. In addition to presenting the history, evolution and typology of amnesty laws, the report presents proposals for dealing with specific problems. The report concludes by noting that the amnesty process can only be effective if it is coupled with social, economic and political measures, such as the lifting of a state of emergency and the holding of free and genuine elections.⁴⁶ A final version of the report on amnesty will be submitted to the Sub-Commission at its next session.

The study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers will be presented to the Sub-Commission next year.⁴⁷ Many members expressed concern over the delay in completing the study on this important subject.

The Sub-Commission also reviewed a half-dozen other preliminary reports and approved the initiation of several additional studies, including one on an optional protocol aiming at the abolition of the death penalty.⁴⁸ The number of these reports and studies is cause for some concern. Although they are the product of each individual expert, their presentation to the Sub-Commission provides an opportunity for a discussion that often will improve their quality and their chances of acceptability to the entire group. This process facilitates building on the recommendations included in a report and preparing a draft declaration and convention on the subject in question. As the number of reports requested by the Sub-Commission grows, less time is available to examine each one. The result is that, after a report is approved, there is little follow-up activity, even if the report contains specific recommendations.⁴⁹

Resolutions

Of the substantive resolutions approved by the Sub-Commission, perhaps the most significant was the one that condemns amputations as a form of cruel and degrading treatment.⁵⁰ The resolution, which was opposed by

⁴⁵ UN Doc. E/CN.4/Sub.2/1984/15.

⁴⁶ *Id.* at 15.

⁴⁷ Res. 1984/11, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 12.

⁴⁸ Res. 1984/7, *id.* at 7. The expert from Belgium, Marc Bossuyt, was invited to undertake this study. The subject aroused a great deal of controversy when it was discussed, as a number of countries objected to the notion of considering a protocol outlawing capital punishment when so many countries continued to permit it. See UN Press Release HR/1574, Aug. 15, 1984, at 4.

⁴⁹ The fate of the recommendation included in the Questiaux report, note 33 *supra*, highlights this phenomenon. The purpose of Sub-Commission studies has been questioned by India before the Commission on Human Rights. UN Press Release HR/1503, Feb. 20, 1984, at 7-8.

⁵⁰ Res. 1984/22, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 22-23. The resolution as initially proposed focused on the growing practice of amputation in the Sudan. After a charged debate, the resolution was revoked and reference to the Sudan was dropped. However, the adopted resolution has broader implications than the previous country-specific resolution could have had.

experts from Islamic countries, calls on countries that have legislation or practices entailing amputation as punishment to take the necessary steps to provide for alternate, more humane forms of punishment.⁵¹

Concern was expressed in resolutions regarding the human rights situation in the following countries: Afghanistan and Pakistan,⁵² Chile,⁵³ El Salvador,⁵⁴ Guatemala,⁵⁵ Iran,⁵⁶ Paraguay,⁵⁷ South Africa,⁵⁸ Sri Lanka⁵⁹ and Uruguay.⁶⁰ Most of the country-specific resolutions involve countries that are the subject of Commission resolutions.⁶¹ This year, however; three country-specific resolutions initiated by the Sub-Commission were approved.⁶²

The most controversial of the country-specific resolutions involved Sri Lanka. At its previous session, the Sub-Commission had adopted a resolution calling on Sri Lanka to submit information to the Commission on Human Rights regarding the communal violence of July 1983.⁶³ The Sri Lankan Government prepared a formal submission for the Commission and, following an energetic lobbying effort by the Sri Lankan representatives, the Commission decided that further consideration of the issue was unnecessary.⁶⁴ This year's Sub-Commission resolution, which followed on the heels of renewed communal violence, was weaker than the previous one, as it merely called upon the Government to report to the next meeting of the Commission on the progress made in its investigation into violent incidents and its efforts to rectify the situation.⁶⁵

The experts from the United States and the Soviet Union each introduced three resolutions that the Sub-Commission found too controversial to consider. The resolutions concerned the plights of Andrei Sakharov,⁶⁶ Raoul Wallenberg,⁶⁷ Jews in the Soviet Union,⁶⁸ Leonard Peltier⁶⁹ and the citizens of Northern Ireland,⁷⁰ and President Reagan's remarks on the

⁵¹ *Id.* at 26.

⁵² Res. 1984/6, *id.* at 7.

⁵³ Res. 1984/29, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 7-8.

⁵⁴ Res. 1984/26, *id.* at 3-4.

⁵⁵ Res. 1984/4, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 4-5.

⁵⁶ Res. 1984/14, *id.* at 17-18.

⁵⁷ Res. 1984/9, *id.* at 10.

⁵⁸ Res. 1984/4, *id.* at 10; Res. 1984/34, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 4-6.

⁵⁹ Res. 1984/32, *id.* at 1.

⁶⁰ Res. 1984/27, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.1, at 5-6.

⁶¹ See, e.g., the following resolutions of the Commission: Res. 1984/4, UN Doc. E/CN.4/1984/77, at 25-27; Res. 1984/5, *id.* at 27-28; Res. 1984/10, *id.* at 35-36; Res. 1984/53, *id.* at 90-92; Res. 1984/54, *id.* at 92-93; Res. 1984/55, *id.* at 94; and Res. 1984/63, *id.* at 100-01.

⁶² The resolutions pertaining to Paraguay, Sri Lanka and Uruguay were initiated by the Sub-Commission. At its previous session, the Sub-Commission initiated fewer resolutions. Whether this marks a trend and how the Commission will react remain to be seen.

⁶³ Res. 1983/16, UN Doc. E/CN.4/Sub.2/1983/43, at 83-84.

⁶⁴ Commission on Human Rights Dec. 1984/111, UN Doc. E/CN.4/1984/77, at 106. The Sri Lankan submission can be found in UN Doc. E/CN.4/1984/10.

⁶⁵ Res. 1984/32, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 1.

⁶⁶ UN Doc. E/CN.4/Sub.2/1984/L.13.

⁶⁷ UN Doc. E/CN.4/Sub.2/1984/L.12.

⁶⁸ UN Doc. E/CN.4/Sub.2/1984/L.42.

⁶⁹ UN Doc. E/CN.4/Sub.2/1984/L.28.

⁷⁰ UN Doc. E/CN.4/Sub.2/1984/L.31

launching of a nuclear attack.⁷¹ The Sub-Commission avoided debate on these resolutions by characterizing them as "political." It decided that they would be considered only after all the others and then ran out of time before debate could begin on the political resolutions.

The decision to characterize resolutions as "political" because of the countries named in them ensures that certain powerful countries will never be the subject of resolutions. If a rule were adopted that required a resolution to have a minimum number of sponsors before it could be considered by the Sub-Commission, resolutions supported by only one or two experts would not result in lengthy and, most likely, polemical debates.⁷²

Participation by Nongovernmental Organizations

As in past years, NGOs contributed significantly to the work of the Sub-Commission. In addition to providing its members with information pertaining to the human rights situation in specific countries through oral interventions, written statements and informal discussions, NGO representatives lobbied for the adoption of specific resolutions, at times taking a major hand in drafting the resolutions, and fulfilled a significant role in the working group sessions. For example, the efforts of Amnesty International, first in presenting a dramatic intervention on the practice of amputation,⁷³ and then by following the presentation with a lobbying effort, had considerable influence on the ensuing resolution on amputation.

With respect to oral interventions, the trend in favor of permitting NGOs to discuss specific countries where human rights were being violated continued.⁷⁴ A number of individuals presented stark, first-person and eyewitness accounts of human rights violations.⁷⁵ Government observers responded to the allegations presented by the NGOs, occasionally impugning the motives and sources of the NGOs presenting the information.⁷⁶

NGOs faced some difficulties in having their written statements circulated at this year's session. The UN Human Rights Centre, which supervises the circulation of written statements, relied on ECOSOC Resolution 1919⁷⁷ in refusing to circulate NGO statements that referred to one

⁷¹ UN Doc. E/CN.4/Sub.2/1984/L.29.

⁷² However, it should be noted that, this year, a number of resolutions that initially had only two sponsors were circulated and ultimately adopted. See, e.g., Res. 1984/1-36, UN Docs. E/CN.4/Sub.2/1984/GRP.2 and Add. 1-2. Thus, the basis for declaring resolutions political at this year's session was not their lack of sponsors.

⁷³ The representative from Amnesty International read a Sudanese newspaper article describing an amputation that took place within the last year in the Sudan.

⁷⁴ The trend began in 1976. See note 11 *supra*.

⁷⁵ For example, a woman from Turkey described the torture she suffered in a Turkish prison. An Ahamadiyya Muslim described the persecution of his sect by the Pakistani Government.

⁷⁶ For example, the Sri Lankan observer unequivocally denied several NGO statements. The Guatemalan observer dismissed every NGO statement as totally without foundation.

⁷⁷ UN Doc. E/1652, at 8 (1975).



country only or included language deemed inappropriate. Representatives of the Centre explained that they were merely reestablishing the policy that existed until 3 years ago.⁷⁸ Although the NGOs will have to give more attention to complying with the specifics included in the Centre's guidelines, they should be able to circulate the same type of information.⁷⁹

General Observations

This year's session raised once again the question of the appropriate role for the Sub-Commission: should it be a forum for publicizing violations of human rights or should it devote its efforts to developing substantive human rights norms?⁸⁰ Most human rights activists hope that the Sub-Commission can fulfill both roles, and frequently it does. However, there are times when the use of the Sub-Commission as a forum for publicizing human rights violations in certain countries results in polemical exchanges, which makes it more difficult to reach consensus on other important issues. The status of the Sub-Commission as a body composed of individual experts frequently is lost during these exchanges.

As was mentioned above, the Sakharov matter, and other allegations of human rights violations in the Soviet Union, contributed to the polemics at this year's session, yet ignoring Sakharov's situation would have been troubling in view of his active defense of human rights over the years in his country and elsewhere.⁸¹ In the end, the resolution on Sakharov was not even debated. Most of the experts from Western Europe and Latin America, while undoubtedly sympathetic to his plight, believed that the resolution was unlikely to pass and that the time spent debating it could be better spent on other matters.⁸²

The fate of the Sakharov resolution highlights another concern raised by some of the experts and government observers: why are certain countries the subjects of condemnatory resolutions, while other countries,

⁷⁸ The criteria for circulating a written statement as explained by representatives of the Centre are consistent, for example, with those described in the article, prepared in 1982, on direct intervention at the United Nations. See Kamminga & Rodley, *Direct Intervention at the U.N.: NGO Participation in the Commission on Human Rights and its Sub-Commission*, in GUIDE, *supra* note 6, at 186.

⁷⁹ In particular, the guidelines provide: (1) the statements must be in reference to a human rights item on the agenda; (2) the submitting organization must have special competence in the subject matter of the statement; and (3) a statement containing allegations of human rights violations in a particular country may not be circulated as a UN document except in exceptional instances. A copy of the guidelines, as circulated by the Centre, is on file with the International Human Rights Law Group.

⁸⁰ Other observers of the Sub-Commission have asked similar or identical questions following previous sessions. See, e.g., Hantke, *The 1982 Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 77 AJIL 651, 662 (1983); Gardeniers, Hannum & Kruger, *supra* note 2, at 367, 369-70; Hannum, *Human Rights and the United Nations: Progress at the 1980 Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 3 HUM. RTS. Q. 1, 1, 9-14, 16-17 (1981).

⁸¹ In 1975, Sakharov won the Nobel Peace Prize for his work as a human rights advocate.

⁸² Guest, *U.N. Human Rights Panel Spurns Sakharov Case*, Int'l Herald Trib., Sept. 3, 1984, at 5, col. 1.

with equally poor human rights records, are ignored? The answer resides in the fact that the experts, although in theory independent, too often reflect the views of their home country's government. Thus, the countries with few friends—e.g., Chile, El Salvador and Guatemala—are most likely to be the subject of condemnatory resolutions.

In other instances, a country may be the subject of a resolution if a number of experts believe that passage of a resolution would embarrass it into improving its internal situation. For example, while Sri Lanka may not be among the worst violators of human rights in the world, many experts believe that it will respond to adverse publicity about its human rights record.

Similarly, the report on the mission to Mauritania, though criticized off the record for not being sufficiently hard-hitting and for having avoided the particular plight of women altogether, marked the opening of an important channel for assistance on a serious matter between a UN human rights organ and a member country.⁸³ Perhaps other countries will follow Mauritania's example and look to the United Nations for assistance on serious domestic problems relating to human rights.

It will be interesting to see how the Commission on Human Rights reacts to the polemical nature of this year's Sub-Commission in its annual review of the work of the Sub-Commission. Assuming the Commission does not unduly restrict the Sub-Commission's activities, next year's session may be quite productive because it will mark the second year of the members' 3-year terms.⁸⁴ By that time, the members will have gained the experience of having worked with one another the previous year, but they will probably not be as concerned about their reelection to the Sub-Commission as in the third year of their terms.

Next year, the Sub-Commission will have before it a number of completed studies.⁸⁵ Two of the Sub-Commission working groups should complete their work on draft guidelines for the mentally ill and on a draft declaration on unacknowledged detentions.⁸⁶ Also next year, the Sub-Commission for the first time will have separate agenda items on the rights of women and children,⁸⁷ permitting more detailed study of these

⁸³ See Res. 1984/28, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 7.

⁸⁴ On the productivity of the second year of the term, see Gardéniers, Hannum & Kruger, *supra* note 2.

⁸⁵ It is expected that studies on the following subjects will be completed in time for consideration by the Sub-Commission at its next session: Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights (*see* Res. 1984/11, UN Doc. E/CN.4/Sub.2/1984/CRP.2, at 12-13); Status of the Individual and Contemporary International Law (*see* Res. 1984/2, *id.* at 2-3); The Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Human Rights and Fundamental Freedoms (*see* Res. 1984/3, *id.* at 3-4); Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers (*see* Res. 1984/11, *id.* at 12-13); Prevention and Punishment of the Crime of Genocide (Res. 1984/1, *id.* at 2); The Right to Adequate Food (*see* Res. 1984/15, *id.* at 18).

⁸⁶ The draft declaration is designed to deal with the problems of disappearances and the mistreatment of prisoners.

⁸⁷ Res. 1984/33, UN Doc. E/CN.4/Sub.2/1984/CRP.2/Add.2, at 2-4.

subjects. Moreover, the Sub-Commission will have before it a draft definition of the term "minority,"⁸⁸ a question that undoubtedly will be the subject of considerable debate.

As the Sub-Commission confronts this crowded list of important initiatives, the debate over its role is certain to continue.

LARRY GARBER AND COURTNEY M. O'CONNOR*

THE XIII INTERNATIONAL CONGRESS ON PENAL LAW

The International Association of Penal Law holds an international congress every five years in a different country. The 13th congress was held on October 1-7, 1984 in Cairo, Egypt, under the auspices of President Hosni Mubarak.

The congress was attended by some 650 participants from 37 countries. The opening ceremony was attended by more than nine hundred persons. Among the personalities attending this ceremony were the Egyptian Prime Minister, Kamal Hassan Aly, the Deputy Prime Minister, the Minister of Higher Education, the Minister of Justice, the Minister of Social Affairs, the Minister of Youth, the Minister of Economics and the Speaker of the House. The Egyptian judiciary was represented by the Chief Justice of the Supreme Court, the Chief Justice of the Constitutional Court, the Chief Justice of the Council of State, the Procurator General, the Solicitor General, the Administrative Procurator General, the Chief Judge of the Court of Appeals and approximately 50 members of the judiciary. Among the foreign dignitaries were the Attorney General of Sweden, the former Minister of Justice of Finland, the Chairman of the Judiciary Committee of the Italian Senate, the former Chief Justice of the Supreme Court of France, the Chief Justice of the Supreme Court of Norway, the former Chief Justice of the Supreme Court of the Ivory Coast, the Procurator General of Senegal, the President of the International Society for Social Defense and the President of the International Penal and Penitentiary Foundation. The United Nations was represented by the Director of the UN Crime Prevention Branch, and the Council of Europe by the Director of the Division of Foreign Relations. Several countries sent official delegations from their Ministries of Justice, including Argentina, Austria, Belgium, Bulgaria, Canada, the People's Republic of China, Czechoslovakia, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Italy, Jordan, the Netherlands, Poland, Romania, Sweden, Switzerland, Tunisia, the USSR and Yugoslavia.

⁸⁸ See UN Doc. E/CN.4/Sub.2/1984/CRP.1/Add.9, at 2.

* Project Director, and legal intern at the International Human Rights Law Group, respectively. Mr. Garber represented the Law Group at this session of the Sub-Commission. Ms. O'Connor attended the session as a fellow of the Law Group, sponsored by the International Law Society of the American University Washington College of Law and the Law Group.

At the opening ceremonies, Prime Minister Kamal Hassan Aly delivered President Mubarak's speech, which emphasized the supremacy of the rule of law and the preservation of democratic principles in a free society.

The week-long congress dealt with four topics: crimes of omission, economic and business criminality, diversion and mediation as an alternative to criminal proceedings, and judicial assistance and cooperation in international matters. Each one of these four topics was the object of a special preparatory colloquium held in the 2 years preceding the congress and attended by a national reporter for each national section of the Association. The scientific work produced by these preparatory sessions was then published in one of the issues of the *Revue Internationale de Droit Pénal* and distributed to all members of the Association prior to the congress.

At the conclusion of the 5 days of discussion on these four topics, a series of resolutions was adopted that will surely have a significant impact on the criminal justice policy of a number of countries.

The Association is one of the oldest and most prestigious scholarly organizations in the world. Founded in 1889 and reorganized in 1924, it now has over three thousand members and associates in 68 countries. Its quarterly, the *Revue Internationale de Droit Pénal*, is in its 55th year of publication and is subscribed to by some 1,300 law libraries and institutions throughout the world.

In 1972 the Association established the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, which every year now conducts approximately eight conferences, seminars and meetings of committees of experts for the United Nations and the Council of Europe. The annual attendance at these activities amounts to some six hundred persons (law professors, judges, prosecutors, government officials, practitioners and researchers). In the last 10 years, the Institute has hosted 66 programs attended by more than four thousand participants from 71 countries, including professors from 193 universities. The Institute publishes some of its proceedings and has issued 37 publications relating to its programs. It has collaborated with 17 international organizations and its activities have been covered extensively by the Italian as well as the international media.¹

The author has been Secretary-General of the Association since 1974; he had served as Deputy Secretary-General for the previous 2 years. The first American to have been elected to that post since the organization was created, he was reelected unanimously and by acclamation at the Cairo congress for another 5-year term. He is also Dean of the International Institute of Higher Studies in Criminal Sciences and the coeditor in chief of the *Revue Internationale de Droit Pénal*.

M. CHERIF BASSIOUNI*

¹ In 10 years, there have been over seven hundred articles about the Institute in some 34 newspapers and magazines as well as a number of radio and television programs.

* Professor of Law, DePaul University College of Law.

BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory. Edited by R. St. J. Macdonald and Douglas M. Johnston. The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1983. Pp. vii, 1234. Dfl.325; \$120.

If I had been a member of the 1984 Committee on Annual Awards of the American Society of International Law, I would have pushed hard for this incredibly valuable collection of original essays on international legal theory that coeditors Macdonald and Johnston have put together. Their achievement is to provide readers with generally first-rate work by a diverse array of top-quality international law specialists. Not everyone currently significant is represented, of course, yet the volume is the most representative of its kind in existence. There are rich offerings from European and American jurisprudential perspectives, as well as more than token contributions from Marxist (Soviet and Chinese) and Third World authors. Reading this one volume, itself no small undertaking, would provide students at any level with an excellent grounding in the development, theoretical foundations and controversial character of international law. No library anywhere in the world can afford to pass up *The Structure and Process of International Law*.

It is a platitude to report that a collection with 40 authors is uneven, and this one is. At the same time, its unevenness is far less evident than is the remarkably high quality of most of the contributions. Somehow, the editors must have relied on their professional stature or resorted to moral suasion. Perhaps, they have a knack for writing wonderfully enticing letters of invitation. By and large, the chapters, some of which are very substantial contributions, reflect the highest quality work of a particular author. The various chapters are not, in other words, pulled out of a drawer to satisfy a request received in the mail. It is in this central respect that the editors are to be congratulated for assembling such a rich harvest.

The book comes at an appropriate time. By seizing the high ground of theory and the long view of legal development over decades and even centuries, the cumulative impact of *The Structure and Process of International Law* is actually quite encouraging. The volume embodies the ferment that characterizes many dimensions of international law, but it aptly resists temptations to be "current" or "partisan." By so doing, the current mood of disillusionment with international law and organization is ignored without falling into the legalistic trap of refusing to take account of geopolitics.

The editors start from the interesting premise that the complexity of international life and an increasing disposition by the scholar to leave the

academy ("the tower") to take part in the real world ("the arena") of governmental diplomacy and corporate activity have weakened the theoretical comprehension of international law as a specific domain. Their book is in a sense an attempt to restore theoretical work to its proper place in the discipline, and thereby lessen the tendency of specialization, practice and activism to reduce international legal studies to a series of subspecialties (e.g., oceans, trade, communications, banking).

Having praised so ardently (and sincerely), let me conclude with a qualification or two. The editors, perhaps in the spirit of theoretical detachment, make no brief for the relative *autonomy* of the tower. One of the costs of entering government service or the market is that the international lawyer risks becoming a liveried servant for powerful, manipulative forces in the world. It is not only the complexity and specialization that is drawing the sap from international legal theory, it is also the increasing dominance by state and corporation over the lifeblood of civil society. These issues are not addressed in either the fine editorial introduction or any of the substantive chapters.

Another concern of mine is the failure of the more than 1,200 pages to say anything very important about the specific historical circumstances of international law at this time. Indeed, Covey Oliver does have a short, pertinent section on "survivalism" on page 1,217 in his essay placed at the end of the collection, but it seems too little, too late. We are, many of us feel, living in a situation of "permanent emergency." To avoid catastrophe and work toward a safer, fairer, more sustainable world requires the directed energies of international lawyers, among others. This survival agenda is new in important senses, and it is not about to dissipate as fashions change, and thus it poses fundamental theoretical questions about the character of international law as a discipline, as well as suggests certain possible priorities for scholars. We would not expect our best doctors to do research on some remote medical technology if our civilization were being destroyed by an epidemic disease!

The richness of this volume and the caliber of its many intellectual performances inhibit me from discussing individual chapters. To single out a few for comment under these circumstances seems invidious and arbitrary. I can only say that we have here between two covers an extraordinary sampling of the best thinking being done by international lawyers in the main power centers of the world, and that anyone eager to keep up with the discipline can ill afford not to read his way through to the end.

RICHARD FALK
Board of Editors

Public International Law. By Branimir M. Janković. Dobbs Ferry: Transnational Publishers, Inc., 1984. Pp. xxi, 423. Index. \$45, cloth; \$25, paper.

This book introduces the reader to the substance of international law and the role that it is supposed to play in world affairs. Of particular note

is the author's socialist perspective. It affords the reader interesting insights into disparate philosophical and theoretical interpretations of international law, as well as a clearer understanding of the Marxist legal approach to events in contemporary international politics.

The work is divided into three main parts. A rather lengthy introduction (76 pages!) sets the stage by discussing the nature of international law and its sources, historical development and diverse theoretical evolution. Part 1 treats the subjects of international law, viz., states, international organizations and man as an individual in the legal system. As international actors, states are appropriately evaluated in terms of recognition as a legal policy, their inherent legal responsibilities, their rights and duties, and pertinent territorial considerations. The United Nations and its functional composition are the organizational focus, while the multifaceted post-World War II evolution of human rights sets the principal context for assessing man's place in the law of nations. Part 2 deals with the "legal regulation of international relations." Towards this end, diplomatic agents and the legal nuances of treaty making are evaluated, and the means of peaceful dispute settlement are analyzed vis-à-vis the legal implications of resorting to war as an instrument of national policy.

On balance, this work furnishes a traditional treatment of public international law, although the author tends to place undue credibility on the United Nations as a mechanism for developing and codifying international law. The UN Charter is depicted as being not merely a near-universal multilateral treaty, but also a world constitution possessing sufficient power to generate "consensus legislation," which can thus give rise to valid international norms. Moreover, he contends, international law is in essence "infralegal law," i.e., law in which norms acquire enhanced validity with the persistent promulgation of additional treaties. Regarding intellectual grounding, as might be expected, this text draws the bulk of its theoretical underpinning and support from European authorities, especially those in the German, French and Yugoslav schools. In this respect, the author's approach provides a welcome contrast to that supplied by most contemporary Western international law texts.

Nevertheless, in several respects the volume is disappointing. First, in great part the treatment is anachronistic. That is, the work's substantive emphasis falls upon international law that antedates 1970. The overwhelming majority of the nearly five hundred sources contained in the bibliography is drawn from legal literature during the period 1920-1960, and fewer than 10 sources were written after 1970. The United Nations is discussed from what amounts to a 1950s perspective: no reference is made to any Secretary-General other than Trygve Lie; no attention is given to the "New International Economic Order," recent developments in outer space law (e.g., the Moon Treaty and geostationary orbit) or environmental law; and the author's entire discussion of the law of the sea turns on the 1958 Geneva Conventions—the Third UN Conference on the Law of the Sea (1974-1982) is not even mentioned! Furthermore, in discussing the International Court of Justice (pp. 333-39), not a single case or opinion is cited. In fact, there is no substantive analysis of international legal cases,

and the notion of "aggression," incredibly, escapes even a passing reference within the context of international conflict. Given the overt, recurrent episodes of transnational violence during the last three decades, one must strain hard indeed to justify overlooking consideration of aggression as a legal concept within the contemporary world order.

Notwithstanding these deficiencies, the work is not fatally flawed. It will be of particular value to those wishing to glean a representative view of socialist international law. In this connection, Janković's contribution is to be particularly appreciated. It serves to remind the reader that, while the law of nations may be Eurocentric in origin and design, it nonetheless remains susceptible to the influence of a wide variety of multinational interpretations and theoretical approaches. That realization in itself makes this volume worthy of consideration, especially by the beginning student and neophyte scholar of international law.

CHRISTOPHER C. JOYNER
The George Washington University

Grundprobleme und Methoden des Völkerrechts. By Albert Bleckmann. Freiburg and Munich: Verlag Karl Alber, 1982. Pp. 348. DM 48.

Professor Albert Bleckmann must be given credit for being one of the relatively few scholars who focus on methodological questions in international law. His special interests are reflected in the present book, which covers such basic issues as the structures and sources of the international legal order, the functions of the principles of justice, equality and reasonableness, the admissibility of analogies and the impact of power and politics on international law. These problems are but rarely dealt with comprehensively and in depth. In this respect, the reviewer subscribes to Bleckmann's criticism of the positivist and pragmatist orientation of most international lawyers.

Yet—in addition to factually incorrect statements (e.g., not all disputes regarding the grounds for invalidity, termination and suspension under part V of the Vienna Convention on the Law of Treaties, but only those concerning *jus cogens*, are subject to international adjudication)—he seems to go too far in several directions. He strongly advocates resort to new methods (largely based on German legal theory) and claims a key role for theoreticians in the development of international law. Throughout the book, he deduces norms from abstract principles without adding sufficient concrete evidence or giving enough specific examples. Instead, he quotes his own writings most of the time. Therefore, his book is somewhat too complex as an introductory work but not thorough enough for the expert.

Mention should be made here of some of the alleged legal rules that this reviewer finds hard to accept. According to Bleckmann, a norm contrary to the new structures of the international legal system will automatically become void. He holds that states must not violate the interests of the international community—a point upon which he does not elaborate—even though many of these interests today are more contradictory and controversial than ever. (A detailed analysis of the concept of

jus cogens would have been more helpful in this context.) If a developed state such as the Federal Republic of Germany has concluded development assistance agreements with, say, 60 developing countries, Bleckmann considers that it is, in principle, under an obligation to enter into similar treaties with others by virtue of the principle of equality. Strangely enough, he fails to discuss Professor McDougal's policy-oriented jurisprudence, which is similar to his own approach and has the merit of more clearly defining the criteria on which its conclusions are based.

After all, states did not relegate the teachings of publicists to the secondary category of subsidiary means in Article 38 of the PCIJ and ICJ Statutes by accident. One fears that when governments are faced with such sweeping contentions, they will trust legal scholars, who are divided on many issues, even less than they tend to do anyway. These critical remarks should not, however, detract from the value of Bleckmann's stimulating book as a welcome contribution to the methodological debate in international law.

HANSPETER NEUHOLD
University of Vienna

Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice. By Shabtai Rosenne. The Hague, Boston, London: Martinus Nijhoff Publishers, 1983. Pp. xvii, 305. Index. Dfl.130; \$56.50.

Pending a revised edition of his magnum opus, *The Law and Practice of the International Court* (2 vols., 1965), Rosenne published in 1979 a second edition of his *Documents on the International Court of Justice*¹ and in 1983 an article-by-article commentary on the revised Rules of Court adopted by the Court on April 14, 1978.² They entered into force on July 1, 1978. The work on the revision was started in 1967 when the Court established a Committee on the Revision of the Rules of Court. The composition of the committee underwent several changes due to the triennial election of the members of the Court, a fact that may explain at least partially why it took the Court more than 10 years to accomplish its task.³

¹ For a review of the first edition, see 69 AJIL 714-15 (1975). In addition to bringing up to date some material like the General Assembly resolutions relating to the Court, the second edition reproduces the English and French texts of the 1978 Rules of Court and an Analytical Table of Sections of 1978 Rules as Compared with 1972 Rules (pp. 274-77), prepared by the Registry of the Court.

² A partial revision of the Rules was adopted in 1972 and commented upon by Rosenne in *The 1972 Revision of the Rules of the International Court of Justice*, 8 ISRAEL L. REV. 197 (1973). Some of the amendments to the 1946 Rules were revised again in 1978.

³ It may be noted in passing that Rosenne takes a dim view of the system of triennial elections introduced by Article 13(1) of the Court's Statute. In his evaluation, Rosenne makes the point that the revised Rules ensure

complete discontinuity in the composition of the Bench for any case which goes through several phases over a period longer than three years, or which is pending during one

The number of articles rose from 85 in the 1946 Rules to 91 in the 1972 Rules and 109 in the 1978 revision. As a consequence,

[t]he entire numbering of the articles has been disturbed, thus making it extremely difficult to find one's way through the Court's jurisprudence (and that of the Permanent Court as well as that of other international tribunals which have referred to the Court's Rules), or to use most of the existing literature on the Court's practice and procedure [p. 4].

To facilitate this task, Rosenne reproduces the "Analytical Table of Sections of Revised Rules as Compared with 1972 Rules" (pp. 5-6) prepared by the Registry, and an index (pp. 283-305), which contains references to the UN Charter as well as to the Statute and the Rules currently in force and was also prepared by the Registry. In addition, the book contains in an appendix the text of the Statute of the Court with annotations that list the references to articles of the Statute in the judgments, advisory opinions and orders of both the Permanent Court and the International Court (pp. 245-80).

Although the renumbering of the articles of the Rules is troublesome, students of international adjudication need not worry because the commentary provides, where appropriate, ample references and citations to the Charter, the Statute, both the 1972 and the 1978 Rules, and the jurisprudence of the Permanent and the International Court, as well as, rather sparingly, the literature.⁴

Beginning with the distinction between the "Court" and the "Bench," and between "members of the Court" and "judges" composing the Bench, each article is subjected to a rigorous textual and contextual examination. Merely verbal changes and real innovations are pinpointed together with the consolidation of, or breaks with, practice. However, it is neither desirable nor possible to discuss the comments on individual articles of the Rules. Attention may be drawn to two sections of the Rules that have always been of substantial interest, namely, the articles dealing with preliminary objections to the jurisdiction of the Court and admissibility (pp. 158-70) and interim protection (pp. 149-57). In connection with the latter, Rosenne says: "It is an unfortunate fact that since 1946, in no case in which interim or provisional measures were indicated by the Court has the respondent party, which in each case was disputing that the Court had

of the triennial elections, save in very exceptional circumstances. Many observers of the work of the Court have pinpointed the uncertainty which this engenders as regards the composition of the Bench as one of the major factors detracting from the appeal of the Court as an organ for the settlement of international disputes [p. 241].

⁴ For stimulating some of the 1978 revisions, credit is given to the Heidelberg Symposium of 1972, the Panel of the American Society of International Law on the Future of the ICJ (p. 3 n.16) and discussions in the United Nations in 1970-1974 on the Court. The results of the Heidelberg Symposium appeared in *Judicial Settlement of International Disputes* (H. Mosler & R. Bernhardt eds. 1974) and the results of the work of the panel appeared in *The Future of the International Court of Justice* (L. Gross ed., 2 vols., 1976). Rosenne was an active participant in both the symposium and the panel.

jurisdiction, been willing to accept them" (p. 149). Regarding the controversial question of the binding force of such measures, Rosenne refers to Article 290 of the 1982 Law of the Sea Convention, which empowers the court or tribunal to "prescribe" provisional measures⁵ and concludes:

This, together with the fact that the Court has several times decided to indicate provisional measures notwithstanding objections to its jurisdiction still open for decision, may be taken as a sign that the better view remains that under the 1945 Statute provisional measures indicated by the Court are not technically "binding" [p. 150].

The Court's handling of preliminary objections in the *South West Africa* and *Barcelona Traction* cases provoked a great deal of criticism. In Rosenne's view,

it is probably true to say that of all factors that have harmed the Court as an institution in recent years (and in an inhospitable political climate), the handling of preliminary objections, and especially the joining of preliminary objections to the merits, has been the most powerful and in some respects the most politically oriented of the Court's actions [p. 160].

It remains to be seen whether the 1978 reconstruction of the articles governing preliminary objections will provide the basis for a more satisfactory and, one hopes, a more expeditious treatment of this vexatious aspect of the procedure of the Court. It is probably not fair to suggest, as some students of the judicial process might be tempted to do, that in a Court which is only sparingly used by states, there could be a subconscious tendency to stretch out the disposition of the cases that do come before it.⁶

In appraising the 1978 Rules, Rosenne finds evidence of "excessive conservatism" in the failure to open up new patterns of recourse to the Court and to enable individuals to be heard in Court in appropriate cases such as diplomatic protection (p. 238). In failing to do so, "the Court may have deliberately excluded itself from any role in the system of the international protection of human rights which is being laboriously worked out, both inside the United Nations and outside it" (*id.*). The changes in the Rules regarding assessors and *ad hoc* chambers are welcomed although

⁵ Paragraph 1 of Article 290, as finally adopted, provides that the tribunal or court shall have the power to "prescribe" provisional measures, and paragraph 6 provides: "The parties to the dispute shall comply promptly with any provisional measures prescribed under this article."

⁶ Attention may be drawn to paragraph 6 of Article 79 of the new Rules, which was introduced in 1972: "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue" (p. 158). See Rosenne's comment (pp. 162-64), particularly on the difficulty of disposing of objections to jurisdiction *ratione temporis* without a thorough airing of the merits (p. 163). While admitting all the difficulties, it would seem that paragraph 6 of Article 79 puts into the hands of the Court a tool for coping with dilatory tactics of the parties. It was, after all, one of the objectives of the revision to enable the Court to assume a more active role in the proceedings.

no assessors have ever been appointed (p. 240) and an *ad hoc* chamber was established for the first time in 1982 in the *Gulf of Maine* (U.S./Canada) dispute (*id.*). The revised and new articles concerning contentious proceedings indicate a trend towards closer control by the Court (pp. 239, 241), which may not be welcomed by the Court's clients. "The fundamental question," according to Rosenne, is: "Will the sovereign States accept that kind of dictation which the Rules envisage, or will they take the attitude of a plague on all your houses? The experience of this aspect of the 1972 Rules, meagre though it is, gives no encouragement to any sanguine expectations" (p. 239). The changes in the Rules, although they reflect to some extent criticism of governments and students of the Court,

in fact do not attack the roots of the real problems of prolixity, complication, undue delay and expense which have been held up in the past among the principal deterrents to greater use of the Court. . . . In fact, there is no alteration of any significance in the system of pleading as it has developed since the Permanent Court first opened its doors in 1922, and which had its origin in 19th century arbitration practice, except perhaps some increase in the questioning of the parties by the Court or individual judges. Only a radical change in attitude on the part of the Court could produce the kind of result which many Governments and others would like to see [pp. 241-42].

The new requirements concerning individual opinions, which have been growing like mushrooms in the practice of the Court, are desirable, as is the new requirement of listing the names of judges who constitute the majority of the Court. Changes made in connection with advisory proceedings are not likely to produce a greater flow of requests or reduce their costs or accelerate the delivery of the advisory opinions.

Finally, the 1978 Rules do not help to answer fundamental questions "facing the Court as an institution for the pacific settlement of international disputes in the service of the polarized international community of today" (p. 243). It is not merely the question whether the Court should continue to function as an organ of the United Nations or whether it should have a separate status comparable to that of the Permanent Court in relation to the League. The real question is whether in a crisis situation statesmen will turn to the Court or pursue a political course. The real question, argues Rosenne, is

whether the Court in this phase has taken adequate steps to grasp, even if only in a preliminary and tentative way, *that* challenge by suggesting (perhaps experimentally) new Rules which not merely bring existing practices and procedures up to date (something very much needed), but which in a conceptual sense look forward towards meeting the demands and the anxieties facing the statesman and diplomat in the last two decades of the twentieth century [p. 243].

In sum, it seems questionable whether any more far-reaching changes in the role of international adjudication can be effected without a revision of the Statute and that means, as the Statute is an integral part of the

Charter, of the Charter itself. In this respect, the integration of the Court into the framework of the United Nations has made adaptations more difficult than was the case with the Statute of the Permanent Court, as each of the permanent members of the Security Council has a veto power over amendments to the Charter as laid down in Article 108. To be sure, the Statute of the Permanent Court had fewer parties, but among them were the states that really cared about international adjudication. Today, when all 159 members of the United Nations are automatically and pro forma parties to the Court's Statute, the situation is significantly, one is tempted to say fundamentally, different. The experience with the proposal of 1970-1974 to launch an inquiry into the future role of the Court merely illustrates the situation in which the many who have no use for international adjudication can prevent the few who do from making the Court more responsive to their needs. However, in the "polarized international community of today" could a different result be expected then or now?

Whatever the future of international adjudication may be, Rosenne's commentary will be an indispensable guide for statesmen and legal advisers for possible use of the Court, and anyone doing research on the functioning of the Court will find that he cannot do without it.

LEO GROSS
Board of Editors

Interim Measures in the Hague Court: An Attempt at a Scrutiny. By Jerzy Sztucki. Deventer: Kluwer Law and Taxation Publishers, 1983. Pp. xvii, 332. Indexes. Dfl.95; \$38.

The law's delays could result in the frustration of the purpose of adjudication if courts were not empowered to grant interlocutory injunctions in case of need. Accordingly, the International Court of Justice (like its predecessor, the Permanent Court of International Justice) is empowered, in Article 41 of its Statute, to "indicate" provisional measures (or, as they are usually called, interim measures of protection) in order to protect the respective rights of parties to cases before it. A number of monographs were written on this subject in the early 1930s (including one by an Honorary Vice-President of the American Society of International Law, Edward Dumbauld), but for some 40 years thereafter there was relatively little interest in the subject amongst either academics or practitioners. In the 1970s, however, a number of applications for interim measures were made to the Court, some of which were granted. This revival of the subject has continued in the present decade, as evidenced most recently in the Order of May 10, 1984 in the case of *Nicaragua v. United States*. There has been a corresponding renewal of academic interest in the past decade or so; the present volume, however, is one of the few monographs to have emerged.

The first chapter considers the development of provisional measures in international law generally. The second summarizes the drafting history

of Article 41 of the Statute and of the associated Rules of Court; it also gives a brief account of the cases in which interim measures have been sought. There follows discussion on theoretical and substantive aspects, such as the nature of the Court's powers under Article 41, the object of provisional measures, the duties of litigants, the content of provisional measures, the question of the circumstances to be taken into account, effectiveness and a couple of other issues. Chapter 4 goes into procedural aspects; and the final chapter deals with the two main controversial issues: first, whether and in what circumstances the Court may indicate interim measures when there is uncertainty whether it has jurisdiction over the merits of the case; and second, whether the provisional measures indicated are binding on parties. There follows a very satisfactory critical apparatus, comprising a bibliography, an index of cases, an index of names, an index of references to the Statute and Rules of Court and a subject index.

There is no serious discussion of municipal law analogies (though they can be useful), and the discussion of the jurisprudence of international courts and tribunals other than the World Court is less than adequate. By contrast, the practice and jurisprudence of the latter is subjected to minute scrutiny. Some might think too minute: this is not conducive to an easy read and—more importantly—it is not always profitable to try to construe the observations of a member of a committee, or even those of a judge or judges, with the attention one might give to the words of a charter-party. In general, however, Dr. Sztucki is to be congratulated for the carefulness of his analysis, the accuracy of his account and the soundness—for the most part—of his judgments.

I did not altogether agree with Sztucki's views on either of the two "main controversial issues."¹ So far as concerns the question how far the Court should be sure of its jurisdiction over the merits before it indicates interim measures of protection, it may be true that whatever test is adopted is unlikely to satisfy everyone (p. 255), but this does not absolve the jurist from the duty of stating what he believes would be an appropriate test. Sztucki tends to sit on the fence here, and perhaps does less than justice to the view that the Court should apply a flexible jurisdictional test, depending on "degrees of urgency, of seriousness of anticipated harm, and so on." So far as concerns the binding character of interim measures, I agree with the author that the language and drafting history of Article 41 are inconclusive, and that the same could be said of contextual and teleological arguments. However, this does not exclude the possibility that a state might be obliged to comply with interim measures either for reasons connected with "the substance" of the dispute or by virtue of that state's general or particular obligations in the field of the peaceful settlement of disputes. The author to some extent recognizes this possibility, attributing to interim measures an "intermediate" legal

¹ I have to confess an interest here, having published an article on *Interim Measures of Protection in Cases of Contested Jurisdiction*, in 46 BRIT. Y.B. INT'L L. (1972-73) and having another, *Interim Measures and the Use of Force*, in the press.

status between binding and nonbinding, legal and moral; however, his exploration of this—admittedly, fairly difficult—question is a little too tentative and brief.

The volume under review was published just too late for the author to take into account the other recent English-language monograph on the subject, namely, Jerome B. Elkind's *Interim Protection: A Functional Approach*.² Dr. Elkind's book, as well as being somewhat more readable, does have the advantage of exploring the municipal law analogies in rather greater detail. It also has the virtue of at least attempting to fit the particular subject into a wider conceptual framework—though it has to be said that the particular framework suggested is not an entirely convincing one. Sztucki's book, on the other hand, while perhaps a little too narrowly confined to the immediate issues, does represent the more thorough and balanced account of the subject. He is to be thanked for having produced a work that will be of great value to connoisseurs of the law and practice of the World Court, scholars and practitioners alike.

M. H. MENDELSON
St. John's College, Oxford

Settlement of International Water Law Disputes in International Drainage Basins.

By B. R. Chauhan. Berlin: Erich Schmidt Verlag, 1981. Pp. 480.
DM 89.

From beginning to end, Professor Chauhan's book is comprehensive. He begins with a detailed description of the hydrologic aspects of water and the role of water in the development of society and law. He establishes the premise that water, along with land, is essential to the territorial integrity of individual nation-states. In the development of this early history, he substantiates that "water has, throughout history, been the major determinant of the fate of any culture." He points to the great civilizations of the Nile, the Tigris and Euphrates, and the Indus Valley, and states that "Europe's history throughout the centuries may be told in the stories of the Rhine, the Danube, and the Seine." Given this vital role of water as the very essence of the territorial integrity of sovereign states, the question then becomes how to resolve the competing needs and clashing demands of nation-states for those waters that are international and transboundary.

Chauhan very meticulously provides a complete cataloging of international treaty practice in tables that list the name of every international drainage basin on the globe, with the names of the countries that share the basin; he lists every treaty in which nations have expressly accepted mediation or conciliation as a method of settlement in water law disputes. Similarly, he lists by section and page number every treaty calling for arbitration and provides comprehensive references for referral to judicial

² Martinus Nijhoff, 1981. Reviewed in 77 AJIL 673 (1983) by Professor Stein, and by me in 54 BRIT. Y.B. INT'L L. 250 (1983).

settlement. Thus, if one wants to scan the revelant provisions in almost any extant treaty, one need only refer to the appropriate chapter to be provided a complete index to the treaty practice of the world community. This makes the book a valuable tool to have at one's fingertips. Every chapter is a compendium of established practice.

Of particular interest and difficulty in interstate and international water disputes is the problem of determining the quantum of the exact share of each contending drainage basin state in an equitable apportionment. Chauhan carefully catalogs the various factors to be considered, from water rights based on historical uses to the size of the total catchment area that lies within each state in a drainage basin, and, in general, the various factors that have been considered by treaty practice and international organizations such as the International Law Association in the Helsinki Rules. Chauhan divides these factors into two categories: (1) factors creating legal rights, and (2) equitable factors. This two-prong division is perhaps overly formalistic and may not contribute greatly to an understanding of these factors, but it does represent the carefully organized approach of the author.

One might, at times, criticize Chauhan for being too formalistic or, as Dante Caponera says in the introduction, "reluctant to recognize in his field any rules except those derived from treaties." These kinds of criticisms, however, are modest and do not detract from the overall value of the book as a contribution to dispute resolution regarding international river resources. As the title indicates, the book does address itself to surface water disputes. Given the growing importance of groundwater resources and the likelihood of increasing competition for those resources, we will now have to direct our attention to dispute resolution regarding transboundary groundwater resources. This book, to its credit, will also be helpful in contributing to the thinking and development of mechanisms for allocating and managing the uses of transboundary aquifers, and in the resolution of disputes over those uses.

Chauhan makes a considerable contribution to our understanding of dispute resolution at the international level regarding water resources. He treats these subjects thoroughly and comprehensively, explores the state of the art and suggests directions of development for our dispute resolution machinery on international drainage basins. His work is an excellent book to keep on the shelf for quick reference to its encyclopedic treatment of every treaty consummated under a wide variety of categories relating to international water law.

ALBERT E. UTTON

The University of New Mexico

Apartheid: The United Nations and Peaceful Change in South Africa. By Özdemiş A. Özgür. Dobbs Ferry: Transnational Publishers, Inc., 1982. Pp. xx, 220. Index. \$25.

The actions taken by the United Nations since 1946 to persuade and force the Government of South Africa to abandon its racial policies

illustrate both the capability and the limitations of the world body. A sound knowledge of this subject is therefore essential for any serious student of international law and institutions. This is provided by Özgür's study, which contains a comprehensive and readable account of South Africa's racial laws and practices, the international standards that they violate, the UN response and the impact of UN action on South Africa's domestic policies. In describing and analyzing UN reaction to apartheid, which constitutes the main focus of the study, the author traces the evolution of both General Assembly and Security Council actions from the early days of persuasion and conciliation to the present more aggressive and coercive stance. This survey of UN resolutions is conducted within both a political and a legal framework. On the political front, the author contrasts the impatience of majority opinion in the United Nations with the cautious, and at times obstructive, approach of the major Western powers; while on the legal scene, he examines the domestic jurisdiction clause and the unequal distribution of powers between the two principal organs of the United Nations as obstacles to effective action.

Inevitably, legal disputation features prominently in the study, as the South African Government has in the main defended itself by questioning the legality of UN action. The competing interpretations of Article 2(7) of the UN Charter are examined in historical perspective and the author shows how the United Nations has invoked both human rights violations and the threat to international peace as justifications for bypassing Article 2(7). Unfortunately, no attempt is made to explain the legal basis for South Africa's exclusion from participation in the General Assembly, despite the fact that this exclusion ranks high among South Africa's legal complaints.

Özgür's description of the apartheid legal order is generally accurate. However, he fails to take adequate account of the recent shift in South African policy away from discrimination on grounds of *race* to discrimination on grounds of *nationality*. The homelands policy, which has been accelerated since 1976, envisages that all black South Africans will be deprived of their South African nationality and become aliens, with no claim to participate in the political life of the country. Already 8 million of South Africa's 20 million blacks have been denationalized as a result of the granting of independence to Transkei, Bophuthatswana, Venda and Ciskei.

These new "aliens" are subjected to all the disadvantages of alien status under international law, including deportation from the industrial centers of South Africa to some barren homeland-state. On the other hand, they are denied its advantages, as they are not accorded the minimum standard of treatment that international law demands for aliens. Thus, the South African Government has skillfully invoked concepts of statehood and nationality to justify its denial of political and civil rights to its black majority. This new development has largely escaped the attention of the United Nations, which, in persisting with its rhetoric of past years, has overlooked new injustices in South Africa. By reflecting UN attitudes towards South Africa, Özgür falls into the same trap.

In pursuing its political goals on apartheid by political means, the United Nations has ignored the advisory machinery of the International Court of Justice. This contrasts sharply with the strategy of the United Nations towards the issue of Namibia, in which advisory opinions have played a decisive role. Özgür examines the General Assembly's refusal to allow the question of South Africa's racial policies and Article 2(7) to be referred to the International Court of Justice for an advisory opinion in 1946 and concludes that "in retrospect, it might have been more effective to have had the legal opinion of the Court to strengthen the position of the Assembly" (p. 120). This is now past history, but the author fails to consider the wisdom of continuing with a purely political strategy. For instance, the permissibility of denationalization on grounds of race under customary international law is an issue that seems highly appropriate for an opinion from the Court, particularly as this is now the pivotal principle of modern apartheid and involves a question of customary international law and not an interpretation of the Charter.¹

Apartheid: The United Nations and Peaceful Change in South Africa provides an excellent politico-legal overview of apartheid before the United Nations. However, its largely uncritical portrayal of UN action overlooks the extent to which rhetoric and political posturing have become ends in themselves and obstructed the adoption of a more versatile strategy to bring about peaceful change in South Africa.

JOHN DUGARD

University of the Witwatersrand, Johannesburg

Human Rights and the United Nations: A Great Adventure. By John P. Humphrey. Dobbs Ferry: Transnational Publishers, Inc., 1984. Pp. ix, 350. Index. \$35.

Apparently on the basis of his diaries, John Humphrey, the first Director of the Human Rights Division of the United Nations Secretariat, has provided us with a picaresque chronicle of the period of his tenure, 1946–1966. Here, as Humphrey saw them, are the events, travels, conferences and bureaucratic fights that surrounded the human rights program.

The work can be read at several levels: It is good gossip. It fleshes out the lean bones of 20 years of UN documents. It offers some insights on the art of the possible.

I must admit that I liked it best as gossip. Here are everybody's favorite heroes and goats from the period. Picture Trygve Lie knuckling under to the United States in ridding American "communists" from the Secretariat in 1951. Lie never consulted the Human Rights Division on the matter. Its Director's views were probably known to him: "If the Universal Declaration of Human Rights [then a mere 3 years old] had any meaning, it at least established standards for the organization which had adopted it;

¹ See further on this subject, Dugard, *The Denationalization of Black South Africans in Pursuance of Apartheid. A Question for the International Court of Justice?*, 4 LAW. HUM. RTS. BULL. 11 (1984).

and a stronger Secretary-General would have resisted the pressures and, if his position then became impossible, resigned" (p. 134). Then there is Dag Hammarskjöld's disdain for the human rights program—in spite of the prominence given to the concept in the Charter. Hammarskjöld talked (p. 185) of divorcing the human rights program from the United Nations and in any event replacing the Division by a Human Rights Commission Secretariat of three or four people. A Security Council speech in 1960 in which he referred to flagrant violations of human rights in the Congo (now Zaire) "was the first and last time that, to my knowledge, he ever showed any concern with human rights" (p. 270). And yes, there are also some delightful vignettes involving Jamil Baroody, the Lebanese Christian representative of Saudi Arabia. Baroody dominated the Third Committee of the General Assembly for decades, littering obstacles in the path of the human rights program in general, while he vigorously espoused the inclusion of the right to self-determination in the Covenants. The complexities of Baroody's character are nicely revealed in the account (p. 239) of how he (successfully) shook down the Libyan with diplomatic immunity who owed money to Humphrey.

There is much more to the book than gossip. There is some enormously interesting information on the drafting of the Universal Declaration of Human Rights, the Covenants and the Convention on Racial Discrimination. Here one finds what Humphrey thought happened before the facts were filtered through the bureaucratic machine that makes them look so bland in the UN documents edition of history. The author explains in his preface that the book has "none of the appointments and paraphernalia of scholarship" (p. ix). As it turns out, this is a strength. In the context in which Humphrey presents the material, it stands on its own. Others can add the document numbers. This material is bound to put some flesh on a dozen PhD dissertations. There are numerous insights: a good discussion of the way the human rights seminar series was able to pull off some good visibility for the United Nations and human rights at a time when the political will to do anything was very low; some telling comments on the contempt with which states treat the human rights area by sending many of their weakest representatives to the Third (Social, Humanitarian and Cultural) Committee of the General Assembly; and many more.

Humphrey manages to avoid emerging from this as the Mayor Koch of the human rights scene. In spite of some disappointments with the fools and charlatans who made life difficult for him, he is not as arrogant or abrasive as the mayor. He is, indeed, a pleasant change from some of the egomaniacs who pass across the international stage. The book is a delight.

ROGER S. CLARK

Rutgers School of Law at Camden

Implementation of Human Rights Covenants with special reference to India. By H. O. Agarwal. Allahabad: Kitab Mahal, 1983. Pp. x, 210. Index. Rs.80.

The present work, by Dr. Agarwal of the University of Allahabad, India, is a general survey of selected human rights treaties and their

implementation. The first chapter briefly traces the development of the two International Covenants of 1966. International measures of implementation, such as reporting procedures, the interstate complaints system, conciliation procedures and petitions by individuals, are discussed and evaluated in the following chapter. Proposed implementation mechanisms that have not yet been put into effect, such as the proposal for a UN High Commissioner for Human Rights, are also briefly discussed. Regional measures for the implementation of human rights are analyzed in the third chapter. Indicative of the patchy quality of the book, however, is the omission of the African Charter on Human and Peoples' Rights, which was adopted in January 1981.

Domestic measures of implementation are discussed in chapter 4 and some useful suggestions are made, such as the establishment of national commissions and of governmental departments to oversee the promotion of human rights within the respective states and also to introduce human rights concerns at relevant stages in the domestic and foreign policy process. Chapter 5 analyzes the human rights provisions of the Indian Constitution and evaluates their conformity with the standards of the Covenants. This chapter is by far the best in the book and should be of much interest to all readers. Finally, chapter 6 wraps up the discussion by bringing together the author's conclusions on the international system for the promotion and protection of human rights. Appendixes contain the texts of the two Covenants, the Optional Protocol to the Covenant on Civil and Political Rights and India's instrument of accession to the Covenants.

Although a useful survey for the beginning student, some errors of fact and the lack of references to commentaries and to primary sources of information, such as the reports of the Human Rights Committee established under the Covenant on Civil and Political Rights, limit the utility of the work for advanced students and scholars.

FARROKH JHABVALA
Florida International University

Dag Hammarskjöld Revisited: The UN Secretary-General as a Force in World Politics. Edited by Robert S. Jordan. Published under the auspices of the University of South Carolina. Durham: Carolina Academic Press, 1983. Pp. xvi, 197. Index. \$16.50.

Although the book's editor describes this work as in the tradition of a *Festschrift*, "a set of personalized essays that capture various aspects of the career of Dag Hammarskjöld as Secretary-General" (p. ix), it is much more than that. Indeed, the subtitle is more revealing than the title.

Even the editor's prologue focuses as much on the evolution of the job of Secretary-General as it does on Hammarskjöld's role in shaping that august position. This is not to demean the contribution: in a few brief pages of crisp prose, Jordan has effectively summarized a considerable

amount of material. Kurt Waldheim's contribution is in the same vein, offering a rare glimpse of the former Secretary-General's observations about his own role, and a bit less about Hammarskjöld's.

Still, Waldheim does offer the student of international organizations a number of important insights into the sources of Hammarskjöld's successes and failures. He does this by somewhat unsystematically drawing on each of the three "characteristic emphases" in the literature on executive heads—legal-institutional, idiosyncratic (personality or leadership style) and ethical-normative¹—as well as by making a useful observation about the systemic conditions in which Hammarskjöld operated.

In the last regard, Waldheim notes that Hammarskjöld worked in a "simpler world now gone forever" (p. 15); implicitly, at least, he suggests that many of Hammarskjöld's successes and failures are explained by systemic factors, particularly the state of superpower and North-South relations. Later, Waldheim notes the constitutional context within which Hammarskjöld was operating, a theme very subtly developed by Oscar Schachter in his contribution to this volume. Waldheim ventures this observation about Hammarskjöld's leadership style: "Hammarskjöld did not, I think, regard the Secretary-General primarily as a 'force' in world politics but rather as an honest broker, a catalyst, and someone to whom governments could go for help in critical situations" (p. 16). This particular theme is further developed in Mark Zacher's chapter on *Hammarskjöld's Conception of the United Nations' Role in World Politics*. The discussion of Hammarskjöld's personal characteristics is, appropriately enough, left to the chapter by Brian Urquhart, the author of the definitive biography of this most private of Secretaries-General. Although Waldheim, like all of the contributors, speaks of the ethical-normative influences on Hammarskjöld's career, the most eloquent and thoughtful contributions in this regard are by Schachter and Philippe de Seynes. The former provides a fascinating account of how Hammarskjöld sought to fuse rules and flexibility, law and diplomacy. Indeed, Schachter's insight explains a great deal about the success of this leader, particularly when it is combined with James Barros's original comments on the virtues and vices of "quiet" versus "public approaches" to international diplomacy. From his knowledge of Hammarskjöld's academic training and basic human values, de Seynes tries to extrapolate something about Hammarskjöld's views on the problems of developing countries.

Relatedly, de Seynes tries to answer those critics of Hammarskjöld who portray him as having been insufficiently interested in the problems of the poor. He does this, in part, by noting that Hammarskjöld was "less constantly exposed to the Third World economic and social reality, having to spend so much of his time on diplomatic matters" (p. 74). Likewise, Indarjit Rikhye takes responding to Hammarskjöld's critics as one of his tasks in his chapter on the military aspects of peacekeeping. He does this

¹ Cox, *The Executive Head: An Essay on Leadership in International Organization*, 23 INT'L ORG. 205-30 (1969).

in a relatively balanced way by stressing the precedent-setting nature of UNEF, as well as the debit sides of the Congo operations. What is largely absent in both of these essays, however, is explicit statements by the critics to which the authors are responding. Indeed, the most critical comments about Hammarskjöld come in Barros's essay which, significantly, focuses on political decisions.

Perhaps this sort of style is appropriate in a book in the tradition of a *Festschrift*, but it somewhat lessens its analytical value. On the other hand, the book's value is certainly enhanced by the carefully selected photographs that appear throughout the work and the superb bibliographic essay (actually a guide to collections of primary sources) by Larry Tractenberg that concludes the volume.

MICHAEL G. SCHECHTER
James Madison College
Michigan State University

The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights. Edited by M. P. Furmston, R. Kerridge and B. E. Sufrin. The Hague, Boston, London: Martinus Nijhoff Publishers, 1983. Pp. viii, 428. Dfl.130; \$56.50.

In commemoration of the 50th anniversary of the founding of the Faculty of Law at the University of Bristol, the members of the faculty have had the excellent idea of putting together a book of essays that attempts, in the words of the preface, "to take a number of snapshots of the interaction of English and European Law" 10 years after the United Kingdom's entry into the Common Market. This very interesting collection of essays does not purport to be comprehensive and, of course, it is far too early to attempt a definitive assessment of such a far-reaching subject, but its impressionistic approach captures the essence of a historic meeting of legal systems. Of the 12 essays that make up this volume, five deal with the European Convention on Human Rights, four with specific substantive areas of English law (equal pay for women, competition law, company law and immigration law) and three with broad constitutional and policy issues (influences on judicial reasoning, constitutional theory and policy considerations in matters of jurisdiction in conflict of laws).

The legal debate on the 1972 Treaty of Adhesion centered on the twin problems of national and parliamentary sovereignty, the incorporation of Community law into British law, the interpretation of Community law by British courts and the relationship of these courts to the European Court and the harmonization of British and Community laws. The volume under review provides some well-documented answers to the questions posed by membership in the European Communities. David Feldman, in his essay on *Influences on Judicial Reasoning*, concludes that the gap between English and European methods of interpretation of statutes is exaggerated. The idea that English judges are more inclined to seek the "true" or "literal"

meaning of the words used than their European counterparts whose approach is more "purposive" is an oversimplification not borne out by the facts. Where a difference in approach exists, it stems from the form of the legislation rather than any inability to engage in purposive reasoning. In their interesting essay on the impact of Community membership on constitutional theory, Clarke and Sufrin show how the European Communities Act of 1972 succeeded in incorporating directly applicable Community law without incorporating the EEC Treaty as a whole. Rather than permitting an "advancing tide" of European Community law, the Act provided the means by which Community rules could cross the Channel and be enforced in English courts. The subsequent practice and case law appears to bear out the view that both Parliament and the courts have taken an essentially pragmatic approach to the questions of parliamentary sovereignty and the primacy of Community law. While such an approach is no doubt unsatisfactory to the purists on both sides, it serves the long-term interest of integration.

Among the remaining essays in this volume, of particular interest to international lawyers are those concerning the effect of the European Convention on Human Rights on particular aspects of English law.

The volume is well produced and ample footnotes are provided.

RALPH ZACKLIN
United Nations

Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War. By James F. Willis. Westport and London: Greenwood Press, 1982. Pp. xiii, 292. Index. \$29.95.

In the 19th century and after the Boer War, there were sporadic demands for the delivery for trial and punishment of individuals accused of having conducted war in an unacceptable fashion. But it was only with the conjunction of industrialization, almost total national mobilization for war and the skillful use of propaganda domestically and between states that the idea of war crimes trials captured public attention. One of the factors stirring popular anger may have been the asynchronous weapons development programs of the contending parties. It was easy to become incensed about the wickedness of a new weapon . . . if you did not have it.

During the First World War, in Germany and in the Allied countries, there were popular demands for war crimes trials. In both, the demands were initially pressed by nonofficial elites. After the collapse of Romania, the Germans sought delivery of alleged war criminals. In contrast to the rank and file, the enthusiasm of elites for war crimes trials oscillated. To an extent, support for them varied as a function of battlefield successes. Some elites sought personal political or party gains in demanding trials, particularly of the Kaiser. Some, such as Lloyd George, seem to have been fascinated by the idea of a public trial and punishment of Wilhelm. Whatever their political nature, once the demand had been established in

the public mind, politicians, whose enthusiasm for the project might have cooled or been tempered by other interests, discovered that they were captive to the genie they had let out of the bottle.

James F. Willis examines in rich contextual detail the political origins and the diplomatic factors that led to the drafting of Articles 227–230 of the Versailles Treaty and of the comparable clauses in the other peace treaties. Willis traces the origins of the idea of war crimes trials, its adoption as an Allied war aim, the identification in the public mind of the Kaiser as the key party responsible for the war, electoral-political factors, particularly in Britain and France, the dynamics of the Paris Peace Conference and the weird politics of manifold deceit regarding the extradition of the Kaiser from the Netherlands. Particular attention is given to the role of the American delegates at the Peace Conference, especially Lansing and James Brown Scott, who were strongly opposed to international trials, for they saw in them potential infringements of sovereignty. The Americans appear to have been effective in derailing the program at the height of enthusiasm for it. Woodrow Wilson himself seems to have been reserved about the trials, apparently because he felt they would embitter postwar relations, making it more difficult to establish the new order for which he thought the war had been fought.

International trials never took place, but Willis reviews the national war crimes trials that were conducted, in part as a political bargain with the Allies, and gives rather detailed attention to the trials conducted in Leipzig. He also describes the war crimes trials conducted by the Ottoman Empire in its waning days, and the considerations of *Realpolitik* that moved Western powers and the Porte in this matter. The war crimes trials effort after the First World War failed, but the idea was planted and continued to flourish in the interwar period. Here again, short-term political factors undermined many of the proposals.

Willis concludes his monograph with some reflections on the contribution that the Peace Conference's abortive effort to establish international war crimes trials made to the Nuremberg trials after the Second World War. Nuremberg and Tokyo owed much to the abortive efforts after the First World War. Though their nature and the types of crimes considered were different, Willis observes that the proceedings in these latter trials "produced few fundamentally new concepts of war crimes punishment that had not been a subject of deliberations by either the British Committee of Inquiry into breaches of the laws of war or The Commission on Responsibility."

As befits the subject he treats, Willis writes in a sober, often understated style. In some cases, a dry wit is used to communicate the author's appraisal. For example, Willis comments that Lloyd George's "conscience . . . was irregularly active on many matters" (p. 78). In some cases, the author's views of the difficulties of the issue are stated indirectly. Thus, for example, he notes in regard to League efforts to deal with aggression, "it became clear that devising a definition of aggression acceptable to governments and peoples of widely varying character and needs was a

complex undertaking and that a definition could not be developed in isolation from other matters such as arbitration and disarmament." The problem of determining criminality surfaces indirectly. Although the author criticizes terrorism, he appears to acknowledge its dilemma. Thus (p. 163), he observes of the Armenian assassinations of governmental leaders in the Ottoman Empire that "such action was, of course, no proper substitute for impartial judgment but the Armenians had no other recourse."

But sometimes Willis reserves judgment. In the important discussion of the Leipzig trials, for example, it is difficult for the reader to sense whether the author thinks they were abused by the Germans or were by and large fair. That wicked people are acquitted is not always a failure of justice. Contemporary observers of Leipzig are quoted on both sides of this issue, but the general appraisal supplied by the author (p. 147) does not clearly lay ultimate responsibility in this matter to one side or the other. Fuller treatment of some features of the context, which might have explained why war crimes trials became a feature of international politics at that time, would have been helpful.

This is a very fair and balanced book. While the author justly dismisses as a lie the "stab in the back" thesis that the Germans subsequently developed, he is at pains to point out the complexity of the origins of the First World War and the vindictive and ultimately self-destructive nature of key parts of the peace treaties that emerged. The German demand for a truly international trial that would have reviewed responsibility of all parties is treated fairly. And even Wilhelm, who is depicted negatively in the early part of the book, is redeemed after a fashion, ironically by one of his greatest maligners. Lloyd George ultimately acknowledged that the Kaiser "never had the remotest idea that he was plunging—or being plunged—into a European war."

W. MICHAEL REISMAN
Yale Law School

War Crimes and Laws of War. By Donald A. Wells. Lanham, New York, London: University Press of America, 1984. Copublished with the North American Society for Social Philosophy. Pp. x, 137. Index. \$8.75, paper.

A brief, introductory survey regarding war crimes and the law of war has been long overdue. Laymen and lawyers alike have difficulty in assessing this important field of international law. They are unable to find the sources, to work with the practice of states that is the fundamental source for this law, and to separate the law that meets with the shared expectations of both belligerents and nonbelligerents from the law that many hope to see codified in the interests of peace. As with international law generally, the law of war develops through the claims and counterclaims among states, their reciprocal tolerances and their shared expectations of how to regulate the use of violence against each other.

War Crimes and Laws of War does not fill this long-felt need. It does not draw carefully upon the practice of states, and relies very substantially upon publicists whom the author has selected. While Wells's observations and comments with respect to these publicists are interesting, he fails to provide an authoritative treatment, drawn deeply from practice, and severed from those expectations for a higher law infused with morality.

The text only skirts the difficult applications of proportionality and military necessity. It does not provide the reader with a sufficient base upon which he can rely to participate in the debates or discussions concerning the law of war issues. It fails to provide quotations from the source documents, and it fails to provide even in an appendix some of the documents, or selected but relevant passages from the documents. It might usefully have cited the appropriate passages from the Nuremberg decisions, and perhaps offered commentary on these decisions. The author has provided only a summary of what all this complex body of law means to him.

We can all join with the classic writers and other commentators in expressing our shock over warfare, its barbarism, the violence unleashed and largely outside the control of law, and in voicing our frustrations over the fruitless attempts to curb excesses. The law we have has brought some moderation. The law currently shared among states provides a moderating element in regulating the use of violence and its excesses. However, the realities of warfare continue to limit attempts at regulation. States do go to war, and during war their violence is licensed. Organized groups do use force and terrorism and will do so in the future, perhaps increasingly supported by states. Governments do impose barbaric and inhumane treatment on their own citizens in times of peace and war. The regulation of these activities under law has been limited because it has not been possible to enforce that law and make it effective.

This book makes few useful recommendations, and observes only that we will find in the "twin doctrines of national sovereignty and military necessity" the main reasons why the law and the "rules of war" have failed to develop. The issue is far deeper than this. The challenge for lawyers as for others is to look to workable measures that might make the stakes in the use of force or the recourse to war so high that such activities will be neither profitable nor desirable. This has indeed been the attempt of the arms control efforts, even if they are not as such a part of the law of war.

HARRY H. ALMOND, JR.
The National War College

Toward Nuclear Disarmament and Global Security: A Search for Alternatives.

Edited by Burns H. Weston, with the assistance of Thomas A. Hawbaker and Christopher R. Rossi. Boulder: Westview Press, 1984. Pp. xix, 746. \$30, cloth; \$14.95, paper.

Everyone agrees that nuclear weapons present *the* major threat not only to democratic institutions but to civilization itself. In this collection of

articles and extracts, Professor Weston has brought together an extremely valuable set of readings on the nuclear peril. Designed as a text for students at the undergraduate and law school level, it is an indispensable tool for all who are concerned about human survival in the modern age.

This is a hardheaded look at the problem. Weston begins by analyzing the need for confronting the possibility of nuclear extinction and for understanding the arms race. Of particular value in this first part of the volume are three essays dealing with what is called the "crime of silence." Part II deals with the requirement to rethink the nature of security and deterrence today and for understanding the "enemy."

Weston then proceeds to call for nuclear disarmament as a basic necessity. The nuclear threat must be curbed. The final section identifies alternative national defense strategies, supranational organizations and possible political changes that offer a potential for genuine security.

Each chapter—there are 12 in all—is introduced by a brief essay by Weston, which sets forth the general nature of the subject matter. Following the extracts that are reprinted, discussion questions for student (or other) use are posed. Weston gives no clear-cut answers; he leaves it up to the individual readers to draw their own conclusions. Of special value are bibliographies of additional readings that conclude each chapter.

The authors that Weston has brought together, taken as a whole, represent the best thinking of those who would and do challenge the basic assumptions of proponents of nuclearism. They compel the reader to rethink his or her own assumptions as well. Weston shows that people indeed have choices to make about the nuclear peril, if only they had the wit and will to do so. Whether people will live up to today's challenge is perhaps the most portentous legal (constitutional as well as international law) question facing the world today.

This is a first-rate teaching tool for undergraduate classes, for ancillary reading in graduate and law school courses in international relations and international law, and for all who care about human survival—and only saints and fools do not. It should be on the reading list of every member of Congress.

There is one shortcoming for a scholarly text: the absence of an index of any type. Surely, such a volume as this should have had a comprehensive index to help students and other readers locate particular points of interest. If Weston produces a second edition—as perhaps he will, given the proliferation of books and articles on nuclearism—he should compile one.

Some may disagree with some of the selections that are reproduced here, and others might suggest different readings. That is as it should be. Weston's goal was to stimulate discussion and reflection, not to give dogmatic answers. In that, he has succeeded superbly. No one can come away from reading this collection without being enlightened and prodded into serious thinking about nuclearism. Each of the essays is written in readable prose and is not laden with the impedimenta of footnotes. Some of the selections do have notes, but, mercifully for the reader, they are printed at the end.

I read this book at about the same time that I read Andrew Bard Schmookler's provocative *The Parable of the Tribes: The Problem of Power in Social Evolution*.¹ Schmookler's book is one of great originality; it asks profound questions about the human condition and poses dilemmas about the nuclear age. Anyone with an interest in nuclear disarmament should face up to the challenge that Schmookler lays down—about the destructive logic of human systems. Should Weston compile a second edition of his text, he would do well to consider including a summary of or extracts from *The Parable of the Tribes*. The two books complement each other.

ARTHUR S. MILLER

George Washington University

La Guerre civile en droit international. Contribution à l'étude de la responsabilité internationale de l'Etat à raison des dommages éprouvés sur son territoire par des étrangers, du fait du mouvement insurrectionnel. By Christophe Piguet. Lausanne: Université de Lausanne, 1982. Pp. 168.

Piguet's thesis sets out to examine the position of foreigners who reside or possess goods in a country struck by civil war. The damage suffered by such people gives rise to a number of questions relating to international responsibility, of which two, according to the author, are fundamental: in what circumstances may the deeds of the insurrectionary movement be imputed to the state? And when is the state responsible for the acts of its own organs at the time of these deeds? The book approaches these questions by making a threefold examination of state practice, arbitral jurisprudence and theory. An attempt is also made to define civil war and to distinguish it from other types of conflict, particularly wars of national liberation.

The author's approach is workmanlike. Each section of the book follows logically from its predecessor and builds upon what has already been established. The scholarship appears sound and, for a relatively short work, the documentation is impressive. Piguet has run the gamut of much important writing in several modern European languages and has included footnotes on each page that are commendably to the point in most cases.

The most useful aspect of the study, in this reviewer's opinion, is the variety and range of examples of state practice collected and summarized in several sections of the book. These provide easily digested samples of responses to actual situations, which would serve as a useful starting point for any international lawyer seeking a concise set of potentially useful precedents to apply to a new fact situation.

The study also has a historical aspect that serves to demonstrate quite well the way in which international law develops. Much of the state practice cited, for example, is dated and, according to Piguet, there has been no arbitration in this area since the Second World War. Yet it is during this modern period that the international community has witnessed

¹ Published by the University of California Press, 1984.

the emergence of numerous new states, often as a result of a more or less prolonged armed struggle. Piguet himself asks the obvious question that emerges from this: to what extent are new states, or those whose regime has been profoundly modified, bound by the practice and decisions of the last century? He answers the question, in part, by pointing out that the general rules of international law which formerly held sway have been progressively replaced by more particular rules applying among smaller groups of states.

The author's overall approach to his subject has been one of caution and reflects the uncertainty inherent in problems of the nature of those dealt with in the work. The state of flux of this area of the law makes it a difficult one to study coherently, and Piguet is to be congratulated on having produced a useful and concise piece of work.

RUPERT GRANVILLE GLOVER
The University of Canterbury

An International Law of Guerrilla Warfare: The Global Politics of Law-Making.
By Keith Suter. New York: St. Martin's Press, 1984. Pp. x, 192.
Index. \$27.50.

The title of this book is a misnomer. There is very little international law in it. In fact, the thrust of the volume is that "the law of armed conflict is too serious to be left to international lawyers" (p. 184). Moreover, the author seems to be genuinely puzzled by the predilection of international lawyers to examine matters such as the definition of "shipwrecked persons," which he views as "minutiae" (p. 182). The subtitle of the book is more to the point, though even here the adjective "global" is scarcely substantiated by the contents (and can only be explained by the fact that the volume forms a part of the Global Politics Series edited by Peter Willetts). We are left, therefore, with the politics of lawmaking.

In the final analysis, the book—which is based on a doctoral dissertation at the University of Sydney—serves as a paean to the efforts of a single individual, Sean MacBride. The way the author sees it, MacBride single-handedly got a resolution (Resolution XXIII) adopted at the 1968 Tehran International Conference on Human Rights in regard to the need to update the international law of armed conflict. MacBride then advanced the project through the General Assembly of the United Nations (Resolution 2444 (XXIII) and subsequent activities). At a later stage, however, the experts of the ICRC (International Committee of the Red Cross) took over. The outcome is reflected in the twin 1977 Protocols Additional to the Geneva Conventions of 12 August 1949, hammered out by two sessions of government experts and four sessions of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

Dr. Suter is not happy about the Protocols as ultimately formulated. He is not alone in his assessment that something went wrong in the

Diplomatic Conference. But other critics may perhaps think that the conference was too politicized and that, if there was a failure, it was due to the inability of the ICRC to stem the tide of inexperience, which engulfed some crucial debates. By contrast, Suter is of the opinion that the experts at the conference were to blame inasmuch as they "could not see the forest for the trees" (p. 192).

On the whole, it can hardly be denied that, irrespective of the initiative of Sean MacBride and others in the late sixties, it is the ICRC that launched the Additional Protocols into orbit during the seventies. The ICRC would be well-advised to publish its own authoritative version of the evolution of these two legal instruments.

YORAM DINSTEIN
Tel Aviv University

Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects. Volume I. Edited by Meir Shamgar. Jerusalem: The Harry Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, 1982. Pp. 520. Index. IS 700; \$30.

The editor of this book served as Military Advocate General and later as Attorney General of Israel and is therefore very familiar with the legal developments and problems of the period covered.

The book has 10 chapters: "Legal Concepts and Problems of the Military Government—The Initial Stage" by the editor himself; "On the Legal Status of the Gaza Strip" by Carol Farhi; "Ramat Hagolan" by Dr. Ya'akov Meron; "The Power of Supervision of the High Court of Justice over Military Government" by Eli Nathan; "The Military Courts" by Dr. Zvi Hadar; "Applicability of Multilateral Conventions to Occupied Territories" by Professor Theodor Meron (a reprint of an article that first appeared in this *Journal*¹); "Local Government in Judea and Samaria" by Moshe Drori; "The Reports of the U.N. Special Committees on Israeli Practices in the Territories—A Survey and Evaluation" by Tat Aluf Dov Shefi; "Development of Oil Resources in Sinai" by Dr. Meir Rosenne; and the final chapter, "The Religious Courts in the Administered Territories," by Dr. Ya'akov Meron.

A map shows the Jordan-Israel armistice lines of 1949, but it is not very clear. There are three appendixes, a table of cases and an index.

In chapter I, Mr. Shamgar, strongly and in great legal detail, denies that the Fourth Geneva Red Cross Convention of 1949 is applicable to the occupied territories, since Jordan also was merely an occupier and not a sovereign over these territories.² This view was opposed by the Inter-

¹ 72 AJIL 542 (1978).

² See also Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968).

national Red Cross, which stated that the Geneva Convention should be applied to any occupied territory.

The law that existed in the West Bank and Gaza on June 7, 1967 was to remain in force, but with the important proviso that it could be modified by the military government for the purpose of maintaining public order and safety through legal binding orders. In this case, the military government acts, according to the author, "in deference to international law and the guiding principles of the Israeli system of law."

The Israeli Supreme Court, aside from having appeals jurisdiction in cases adjudicated by the district courts, acts as a court of first instance, called the High Court of Justice, in matters in which it is considered necessary to grant relief in the interest of justice and which are not under the jurisdiction of any other court or tribunal. Among the High Court's powers are giving orders to state authorities and their officials requiring them to do or refrain from doing any act in performance of their functions according to law.³ The High Court has played an important role in suits brought by Arabs whose land had been seized by the military authorities and used for the establishment of civilian Jewish settlements. The power of supervision of the High Court of Justice over the military government is discussed in detail by Eli Nathan in chapter IV.

Appendix A, Selected Judgments of the Supreme Court of Israel (sitting as High Court), is one of the most interesting parts of the book. In this appendix, three cases brought by Arab landowners against Israeli officials because of the establishment of Jewish settlements on their land are reproduced in full. It would be impossible in the framework of a book review to discuss these cases in detail, but a few important highlights will be given. In the first case, known as the *Beth-El* case, the Court dealt with the 1907 Hague Convention Concerning the Laws and Customs of War on Land (Fourth Convention) and the 1949 Geneva Convention Concerning the Protection of Civilians in Time of War. Justice Witkon, who wrote this opinion, stated that "it is not disputed that the petitioners [i.e., the former Arab owners of the land] were protected persons within the meaning of this term in international law." As far as the status of these two Conventions is concerned, the 1907 Hague Convention can be regarded as customary international law and therefore can be taken into account by a municipal court. The 1949 Geneva Convention, however, is to be regarded as conventional international law and is binding only on states *inter se*. The Court accepted the plea of the military commander of the region, who said "that vital security considerations necessitated the acts which are subjects of these proceedings," as *prima facie* reasonable. The decision thus went against the Arab petitioners.⁴

In the *Matityahu* case, the Court also upheld the opinion of the military experts and the corresponding decisions of the Government and the Ministerial Committee and found against the petitioners.⁵

³ For further details, see H. E. BAKER, *THE LEGAL SYSTEM OF ISRAEL* 199 (1968).

⁴ HCJ 606/78 and 610/78, 33 Piskei Din [the official publication of Israeli Supreme Court decisions, abbreviated P.D.] (2) 113 (1979).

⁵ HCJ 258/79, 34 P.D. (1) 90 (1980).

The most important and significant of the three cases reproduced in the book is the third one, the so-called *Elon Moreh* case.⁶ It deals with the legality of the establishment of a civilian settlement at Elon Moreh at the approaches to the city of Nablus on land under private Arab ownership. The Commander of the Judea and Samaria Region issued an order stating that the land was required for military needs. In his affidavit, however, he said that the Minister of Defense believed "that security needs can be realized by means other than establishing a settlement at the said place." The settlers themselves, who belonged to the radical *Gush Emunim* (Bloc of the Faithful), used religious arguments, regarding the Arab owners' petition based on international law as "totally irrelevant."

The Court expressed respect for the settlers' "profound religious belief" but declared that religious law is applied only as far as secular law allows it and that the Court must apply the law of the state. The Court concluded that the Ministerial Defense Committee had initiated the establishment of the settlement, that the Chief of Staff had not approached the political level with a proposal to establish a settlement at Elon Moreh and that no plan existed, approved by an authorized military element, to establish a civilian settlement at the site. On the basis of the evidence before it, the Court ruled in favor of the Arab petitioners.⁷

In evaluating the book as a whole, it should be kept in mind that it deals with events only up to 1980. The historical material is valuable, but does not generally add very significant data to widely known facts. Shamgar's detailed discussion of the 1949 Geneva Convention shows his skill as an experienced lawyer as well as his uncompromising attitude. A great deal has happened since this book was written, such as the Israeli invasion of Lebanon. Internally, the inconclusive results of the 1984 elections may affect the Israeli settlement policy on the West Bank.

HERBERT J. LIEBESNY
Arlington, Virginia

International Extradition: United States Law and Practice. Binders I and II.
By M. Cherif Bassiouni. London, Rome, New York: Oceana Publications, Inc., 1983. \$85/binder.

This loose-leaf service is based upon the author's previous book, *International Extradition and World Public Order* (1974),¹ a title that would have described the present work better than the title selected. The author attempts to cover the current extradition law and practice of the United States; the general concepts of extradition; extradition laws and practices

⁶ HCJ 390/79, 34 P.D. (1) 1 (1980).

⁷ For a discussion of the *Elon Moreh* decision and its repercussions in Israel, see Lustick, *Israel and the West Bank after Elon Moreh: The Mechanics of de facto Annexation*, 35 MIDDLE E.J. 557 (1981). For more recent developments regarding the Israeli settlements in the West Bank, see also M. BENVENISTI, *THE WEST BANK DATA BOOK* (1984). On the law applicable to the Israeli settlers, see *id.* at 43.

¹ See review by L. C. Green, 54 CANADIAN B. REV. 193-97 (1976).

of other countries; rendition under status of forces treaties; the return of transferred offenders under prisoner transfer treaties; the immigration laws of the United States relating to deportation, expulsion, exclusion, denaturalization and asylum; the various theories of criminal jurisdiction; and the proposed 1981 and 1982 extradition bills of the United States.

The author gives an interesting overview of the history of extradition from the peace treaty between Ramses II and the Hittites (circa 1280 B.C.) to the present. The conflicting views of the classical writers on international law concerning the duty of a state to extradite are set forth. Some 60 multinational treaties that the author considers as imposing a duty to extradite or prosecute are listed, and from the number of conventions and signatories the author concludes that the duty to extradite or prosecute, at least for international crimes, has become customary international law. However, he does not demonstrate the extensiveness and virtual uniformity of state *practice* that evidence a general recognition that a rule of law or legal obligation is involved, which is required to convert a conventional rule into a customary rule of international law.

The interrelationship of the legislative, executive and judicial branches of the federal government in extradition matters is described. The author correctly notes the authority of Congress to define the substantive requirements and procedures to be followed by the courts in extradition matters. He states that extradition treaties are deemed self-executing, which is generally true, but he does not examine the possibility that certain provisions cannot be self-executing because they relate to matters within the exclusive power of Congress. A compilation of rules of treaty interpretation applicable to extradition treaties is supplied. The negotiating history, preparatory works and diplomatic correspondence are listed among the sources that may be utilized to ascertain the intent of the parties to an extradition treaty. However, the author does not discuss the problems of a defense counsel in obtaining such documents. The question whether subsequent acts by a party to an extradition treaty may abrogate the treaty is not thoroughly examined. The effects on extradition treaties of war, state succession and severance of diplomatic relations are fully discussed.

A historical introduction to the general concept of asylum, the rationale and the legal basis for it and the interrelationship between extradition and asylum are included. The author describes the granting of asylum under U.S. law as an executive function handled by administrative agencies, while the granting of what may be referred to as "extradition asylum" by the denial of extradition is often in the first instance a judicial function. The author justifiably criticizes the system under which a decision to grant or refuse asylum by the administrative agency is not binding on the extradition magistrate and vice versa. In discussing the 1967 United Nations Protocol relating to the Status of Refugees as a possible bar to extradition, the author does not discuss Article 1F of the 1951 Refugee Convention, which provides that the Convention is not applicable "to a person with respect to whom there are serious reasons for considering

that: (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

The possibility of using immigration laws as disguised extradition is recognized by the author. He examines the U.S. laws relating to exclusion, deportation and denaturalization and concedes that deportation or exclusion of an alien is legal, even if it results in a fugitive wanted by another country being sent to that country. Nonetheless, he endeavors to establish that such "disguised extradition" may be a possible violation of international law based upon various multilateral human rights conventions.

Abduction or unlawful seizure of a fugitive as an alternative to extradition is condemned. A thoughtful and critical examination of the application of the maxim *male captus bene detentus* is made. The adherence of the United States to *Ker v. Illinois*² is demonstrated by a discussion of many cases. The author, in discussing the *Toscanino*³ exception, does not mention that on remand the alleged gross misconduct of the U.S. agents was not established. Abduction and unlawful seizure are viewed by the author as violations of international law for which state responsibility is incurred.

It is essential that the requesting state's jurisdiction over the offense for which extradition is requested be recognized by the requested state. The author makes a scholarly examination of the bases of jurisdiction recognized in international law and their application to extradition. Problems arising from concurrent jurisdiction are identified and discussed under the author's recommendations for a policy-oriented inquiry into the problems of jurisdiction in extradition and world public order.

Five basic principles, referred to by the author as substantive requirements, viz., reciprocity, double criminality, extraditable offense, speciality and noninquiry are examined. In connection with the doctrine of speciality, the author surprisingly accepts, without critical comment, the decision in *Berenguer v. Vance*⁴ that the Secretary of State, without a judicial hearing, may consent to the trial of an extradited person for an offense other than that for which he was extradited. The author indicates that the individual concerned may waive the application of the principle of speciality by consenting to be prosecuted for an offense at variance with the offense charged in the extradition request, but he does not note that this is true only if the treaty authorizes such a waiver, since the obligation embodied in speciality runs to the requested state.

The grounds for denial of extradition based upon defenses, exceptions, exemptions and exclusions are skillfully organized into those relating to the offense charged, the person sought, the criminal charge or its prosecution, and the penalty. The historical development and meaning of the political offense exception and its application in the United States and other countries are described in detail. The author does not note that in the *Matter of McMullen*,⁵ the United Kingdom, the requesting state,

² 119 U.S. 436 (1886).

³ U.S. v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974).

⁴ 473 F.Supp. 1195 (D.D.C. 1979).

⁵ *In re McMullen*, Magis. No. 3-78-109MG (N.D. Cal. 1979).

presented no evidence on the issue of the political offense exception, but in the *Abu Eain*⁶ case, Israel did. The exclusion of offenses of a military character and fiscal offenses are discussed. The exclusion of nationals from extradition and the problems existing because of the language used in some older treaties as the result of *Valentine v. United States ex rel Neidecker*⁷ are examined. The discussion of the grounds relating to the criminal charge or to the prosecution of the offense includes the legality of the offense; ex post facto; retroactive application of the treaty; double jeopardy—*ne bis in idem*; statute of limitations; right to speedy trial; immunity from prosecution and plea bargain; amnesty and pardon; and a conviction based on a trial in absentia.

The explanation of the present procedure in the United States for extradition to a foreign country covers the proceedings from the request for extradition or provisional arrest to the issuance of the warrant for extradition by the Secretary of State. The thorough treatment of bail and of the right to discovery will be of great help to the practitioner. The author only briefly discusses the important issue of the admissibility of documentary evidence in the extradition hearing. A discussion of the certification of the documents under 18 U.S.C. §3190 and the decisions interpreting that section would have been helpful. Also, it should have been noted that the U.S. officers mentioned in section 3190 will not certify documents for the relator. In the discussion of the review of a finding of extraditability by a petition for habeas corpus, the author erroneously states that if the district court grants the petition, the Government may not appeal.

The author indicates that the United States, by refusing extradition based upon executive discretion, may incur responsibility for violation of international law. Surely this would not be true if the treaty involved contained a provision that the procedures of the requested state govern the proceedings in light of the discretion conferred by 18 U.S.C. §3186.

The procedure for requests for extradition made by the United States is covered by the inclusion of a memorandum of the Office of the Legal Adviser, Department of State, without comment by the author. It should be noted that requests for extradition made by a state of the United States are now sent to the Office of International Affairs, Criminal Division, Department of Justice for review and are then sent to the Office of the Legal Adviser for transmittal to the foreign country.

A table of cases and a table of authorities with reference to the chapters, sections and pages where they appear in the text are found in booklet 12. Regrettably, all cases are listed in the same type; no distinction is made between the cases that are discussed and those that are merely cited.

There is a table of current U.S. extradition treaties that is a handy ready reference tool but should not be relied on to determine whether a treaty is in force. The author indicates, as have others, that three treaties

⁶ *In re Abu Eain*, Magis. No. 79 M. 175 (N.D. Ill.), *aff'd sub nom.* *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1979).

⁷ 299 U.S. 5 (1936).

between the United States and Great Britain that were made applicable to Ireland are in force. However, Ireland regards any applicable extradition conventions between the United States and Great Britain as no longer capable of being implemented as a consequence of the Irish Extradition Act of 1965.

The existing legislation (18 U.S.C. §§3181 *et seq.*) governing international extradition is reproduced in very small type. In view of its importance, it deserves to be set out in larger type. The following legislative documents are also included: the proposed 1981 Extradition Act (S. 1940), the report of the Senate Judiciary Committee (S. Rep. No. 331) and the report of the Senate Foreign Relations Committee (S. Rep. No. 475); and the proposed 1982 Extradition Act (H.R. 6046), the House Judiciary Committee report (H.R. Rep. No. 627, Part I) and the House Foreign Affairs Committee report (H.R. Rep. No. 627, Part II). Although neither of the proposed acts has been enacted, this material contains excellent comments on the existing legislation and will undoubtedly serve as a basis for future efforts to obtain a new extradition law. However, it would have been better if the extensive comments concerning the provisions of the proposed acts had been issued as a supplement after the enactment of a new extradition law.

The author's views as to the ideal extradition law should be considered by the drafters of legislation and by the practitioner seeking to influence judicial development and interpretation of the existing legislation. Although he does not always write in a clear and concise fashion—in fact, in some instances his formulations are confusing—the depth of his research, as demonstrated by the extensive documentation contained in these books, makes them a valuable contribution to the field of extradition.

WILLIAM SUMNER KENNEY
Of the District of Columbia Bar

Pricing and Capacity Determination in International Air Transport: A Legal Analysis. By P. P. C. Haanappel. Deventer: Kluwer Law and Taxation Publishers, 1984. Pp. xv, 210. Index. Dfl.96; \$38.40.

In this book, Professor P. P. C. Haanappel has penned a scholarly work and practical guidebook. It deals with the many complex legal, economic, diplomatic and political issues involved in international air transport. The book transcends the technical field of pricing and capacity determination. It provides an overview of the international and national framework within which air transport has been operating to date. Where appropriate, Haanappel provides a summary, subchapter by subchapter, headed "Preliminary Evaluation," and ends with a "Conclusion and Prospects for the Future." These summaries are to the point; some offer tantalizing forecasts of developments to come in the legal and economic arena of international air transport.

The book discusses the meaning of "pricing" (fares, rates, tariffs) and "capacity" (output, supply). It analyzes the structure and activities of the

International Civil Aviation Organization (ICAO) and other public international organizations with responsibilities in the field of rate making and capacity matters, such as the European Civil Aviation Conference (ECAC), the Latin American Civil Aviation Commission (LACAC) and the Arab Civil Aviation Council (ACAC). It details the organization of the International Air Transport Association (IATA), its history, its achievements and its shortcomings. It describes various other international and regional airline associations, such as the International Air Carrier Association (IACA), the Association of European Airlines (AEA) and the Air Transport Association of America (ATA).

No doubt, had "multilateralism," a multilateral agreement on the international exchange of commercial aviation rights, been accepted by the governments worldwide, international air transport would have advanced faster and better, and the consumer would have benefited. The 1944 U.S. effort in Chicago to bring about such a multilateral agreement and embody in it the concept of free competition did not succeed. The failure could be attributed to the reluctance of states to make the required exceptions to the principle of sovereignty in national airspace. Significantly, this customary international law principle was codified in Article I of the Convention. Also, governments did not want to give the United States too great a competitive advantage, since in 1944 the United States had the largest transport air fleet. Thus, instead of free competition, the concept of commercial "order in the air" was advocated by the majority of states participating in the 1944 Chicago Convention negotiations. Haanappel mentions that Britain, as well as many other states, took this position because their airlines were almost completely destroyed during World War II. Here, a footnote elaborating on the reason for the vast transport air fleet in U.S. hands would not have been amiss. Owing to a World War II understanding between the United States and the United Kingdom, the UK industry was to concentrate on the production of fighter aircraft, whereas the production of bomber/transport planes was left, in the main, to the U.S. industry.

The importance of the 1944 Chicago Convention is well recognized in the book. The herculean effort to carve out concessions from the sovereign national airspace principle by proposals such as the Third, Fourth and Fifth "Freedom of the Air" is fittingly described. And the "Freedom of the Air" concept is lucidly set forth. The book implies, however, that there exists a negotiating history of the 1944 Chicago Convention as a satisfactory research tool. This is not the case. This reviewer has searched in government as well as in nongovernment archives and libraries, in the United States and abroad, to uncover a complete negotiating history—in vain.

Haanappel explains well why "multilateralism" in commercial air transport on a worldwide basis was not realized. Here, a reference to the failure of similar attempts in the EEC context might have been appropriate. In the 1950s, "multilateralism" on matters such as the establishment of a European airspace, arrangements on capacity and setting up the lowest possible tariffs was embraced with some enthusiasm. The stimulus for this

came from economic considerations on the part of the airline industry, the wish to establish a common front vis-à-vis the United States, particularly in the negotiation of air transport agreements, and EEC expectations of increasing the political dimension of the Community. No such agreement was concluded. The assertion of sovereignty in national airspace and the desire of EEC governments to inject themselves into the negotiation of air transport agreements blocked attempts by Count Sforza, then Italian Foreign Minister, to establish a European airspace and a consortium of European airlines. Similarly, the more modest Van de Kleef and Bonnefous plans failed, and so did the Europair/Air Union projects. Still, from the ashes of shattered hopes a phoenix rose in the form of ECAC. And the book rightly notes that a multilateral agreement in the rate-making field was concluded in the framework of the EEC in 1967.

Faced with the failure to negotiate a multilateral agreement, states turned to bilateral agreements to regulate commercial international air transport. Haanappel discusses a number of these agreements, including Bermuda I and II. He notes that Bermuda II came about because of the dissatisfaction over capacity as offered by American and British air carriers over the North Atlantic and the need to deal with charter air services on a more organized basis. However, the expectation that Bermuda II would become a worldwide model for bilateral air transport agreements did not materialize, because the Bermuda agreement was principally aimed at the U.S./UK market, and the Carter administration and its successors wanted to establish freer competition than was reflected in Bermuda II.

The failure of governments to solve commercial problems by multilateral understandings was somewhat alleviated by airlines, which, at the end of the Chicago Convention negotiations, set up IATA and its rate-making machinery. The book contains much useful information on IATA, its structure and organization, its activities and nature; is it a trade association or an open-ended cartel? Haanappel raises the question whether any of IATA's activities are illegal under U.S. antitrust laws and the EEC antimonopoly regulations. The point is made that at present approval by the Civil Aeronautics Board (CAB) of intercarrier agreements does not automatically carry with it antitrust immunity.¹ And, in the light of the 1974 decision of the Court of Justice of the European Communities in *Commission v. French Republic*,² holding that all forms of transportation remain subject to the "general rules" of the Treaty of Rome, exemptions of IATA from the EEC competition rules cannot be taken for granted either. As to IATA's compliance machinery, it is useful to be reminded that while the present policy focuses more on prevention than on punishment, governments can be expected to take stricter action to enforce adherence to IATA Traffic Conference resolutions in cases where they approve these resolutions.

¹ The CAB ceased to exist on December 31, 1984, and most of its remaining authority was transferred to the Department of Transportation (DOT). The DOT is in the process of consolidating all of the Board's antitrust rules.

² 2 COMMON MKT. L. REV. 216, 229 (1964).

It is fortunate that Haanappel gives much space to Charter Transportation—a topic of ever-increasing interest. While the Chicago Convention distinguishes between scheduled and charter flights, it fails to define these terms. The so-called programmed charters, such as advance booking charters (ABCs) and inclusive tour charters (ITCs), could conceivably be considered scheduled flights in terms of the ICAO glossary of definitions. In the United States, with its concept of public charter, part charters and part individual ticketing of charter passengers, the distinction between scheduled and passenger charter air services has become blurred. Haanappel emphasizes that the real difference comes to the fore when one looks at the load factors. Scheduled international air services may have to operate with a minimum average of 30 to 35 percent of empty seats and cargo space, the users of these services having to pay for those empty seats and space; whereas international charter services can fill every seat and all cargo space. Understandably, the tariffs of the latter services can be lower. Another difference, at least in many countries, may be of a regulatory nature: scheduled air carriers may sell directly to the public, in contrast to charter flights which may only be sold to charter participants through intermediaries (tour operators, charter organizers, etc.). A further difference stems from the fact that, to date, no multilateral rate-making machinery, either on the governmental level or carrier level, is in existence for the determination of international air charter tariffs. It is not surprising that some of the bilateral memorandums of understanding on air charter services concluded by the United States and U.S. nonscheduled air services agreements contain pricing provisions.

Haanappel points out that IATA fares have tried to be competitive with charter fares; APEX fares were IATA's answer to ABCs and travel group charters (TGCs), individual or group inclusive tour fares to inclusive (and one-stop inclusive) tour charters (ITCs, OTCs). Capacity, then, and not pricing underlies the difference between IATA and non-IATA scheduled international air transport. And capacity control in international air charter transport is exercised in a variety of ways: multilaterally, bilaterally, unilaterally.

The discussion of "Regulation and Deregulation" is well done and timely. Indeed, in the United States, the deregulation movement finds numerous supporters, in and out of government. Pro-deregulation policies are embodied in the 1977 Air Cargo Reform Act and the 1978 Airline Deregulation Act. The "sunsetting" of the CAB is now a matter of fact. In the international field, deregulation was initiated in 1978 when the United States signed protocols amending certain bilateral air transport agreements, and issued a policy statement on liberal bilateral air transport agreement negotiations. Deregulation policies have also been adopted elsewhere, such as in Canada, Britain and within the EEC framework. A comment on antitrust implications of deregulation might have been appropriate: does it expose airlines to the full impact of antitrust laws?

The chapter on "Recent Developments" comprises, among other topics, an analysis of liberal air transport agreements. Haanappel pinpoints seven main characteristics of these post-Bermuda II agreements. That the United

States had to pay a price for obtaining these agreements should come as no surprise; it had to grant, for instance, additional gateways in the "sunbelt" to foreign carriers. Haanappel analyzes these agreements by reference to a U.S. Model Liberal Air Transport Agreement found in an appendix to an article by Mr. Bogosian, Chief Aviation Negotiations Division, U.S. State Department.³ A list of liberal bilateral agreements is contained in Appendix III of Haanappel's book.

The chapter also includes a discussion of important interrelated recent developments: (1) the U.S. CAB Show Cause Order, which threatened to withdraw antitrust immunity from the IATA Traffic Conferences; (2) the conclusion of the U.S.-ECAC Memorandum of Understanding on North Atlantic air tariffs, the text of which is found in Appendix IV of the book; (3) ICAO's studies, panels of experts and air transport conferences. The restructuring of IATA is another significant recent development. However, this topic is discussed in the chapter dealing with IATA.

In summary, Haanappel's book can be highly recommended for the enlightenment of lawyers, economists and all those interested in international relations. Haanappel succeeds in clarifying many complex and technical aspects of international commercial air transport. Rarely has so much interesting material been compressed in such a readable, lucid form. We are fortunate to have this book available at this juncture in the development of air transport.

CHARLES L. KENT

*Of the District of Columbia and New York Bars
Barrister-at-Law, Lincoln's Inn*

Diritto aeronautico. By Tito Ballarino. Milan: Giuffrè Editore, 1983.
Pp. xii, 308. Index. L. 16,000.

The author is a professor of international law at the Catholic University of Milan, Italy, and the writer of a treatise on private international law, published in 1982. His most recent book on aeronautic law, reviewed here, is a collection of lectures held at the Law Faculty of the Catholic University. It is divided into four parts: (1) public aviation law, based upon the Convention on International Civil Aviation, concluded in 1944 in Chicago, and the regulations issued by the International Civil Aviation Organization (ICAO) under the sponsorship of the United Nations (the author has also included the current principles and provisions of space law under the Space Treaty of 1967, and subsequent conventions and agreements); (2) air transportation law, based upon the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, signed in 1929, and various subsequent conventions concluded since 1929 (this part of the book refers in some detail to statutory provisions enacted by Italy in 1942 in the Italian Navigation Code, which includes maritime, fluvial and aeronautic transportation); (3) laws and regulations

³ 46 J. AIR L. & COM. 1007 (1981).

relating to the legal status of aircraft (airplanes, helicopters, airships and balloons) (it should be noted that the Italian Code considers Hovercrafts as maritime transportation, in agreement with the IATA definition of aircraft); and (4) a concise description of laws and rules relating to the administration of air transportation and the management of airports, insurance matters and organization of airlines (this part of the book is written mainly from the viewpoint of internal Italian legislation and practice).

The author's language, style and presentation are easily understandable and surprisingly clear and lucid, considering the complex legal material treated. The book will surely be intelligible to students interested in aviation law, but also to scholars and writers not yet familiar with this more recent and frequently changing legal area.

The numerous aviation treaties, conventions and agreements are thoroughly described, and a considerable number of cases before international tribunals and national courts are analyzed to give the reader a knowledge of some of the problems and unsettled questions of present aeronautical law and its interpretation in different states. For example, the author describes the difficulty of determining the aerial limit of aviation and thus where state sovereignty ends and space activities begin. The author is inclined to place the limit at a height of 80 to 100 km (48 to 60 miles), but others extend the sovereignty of states to 500 km and more (300 miles), because air particles are sometimes in evidence at such altitudes, even though no air resistance has been observed. Still other scientists and scholars would limit the aeronautic area to the maximum altitude that conventional aircraft have reached in the past, which is some 70,000 feet, and would therefore consider space to begin at that altitude. This controversy is of importance in negotiations concerning limitations of military space activities by the use of ballistic missiles, spy satellites, shuttle devices and similar spacecraft.

This book will be of value to students and scholars who are proficient in the Italian language.

ZVONKO R. RODE
Of the District of Columbia Bar (Ret.)

International Space Law. By Gennady Zhukov and Yuri Kolosov. Translated by Boris Belitzky. New York: Praeger Publishers, 1984. Pp. xiv, 224. Index. Published in cooperation with the Novosti Press Agency, Moscow.

This book, authored by respected members of the Soviet international legal community, is a current assessment of Soviet international space law and policy. Bearing the same title as the 271-page book edited by A. S. Piradov in 1976, it contains 13 parts consisting of an introduction, chapters on "The Concept and Sources of International Space Law," "The Principles of International Space Law," "The Legal Status of Artificial Space Objects," "International Cooperation in the Rescue of Cosmonauts," "International Responsibility for Space Activities," "International Systems

of Space Communications," "Problems of International Law in Relation to Direct Television Broadcasting via Satellites," "Problems of International Law in Space Meteorology," "Problems of International Law in Remote Sensing," "The Delimitation of Outer Space," "The Status of the Moon and Other Celestial Bodies of the Solar System in International Law" and a conclusion.

In these chapters, attention is given to the successes and unfinished work of the UN Committee on the Peaceful Uses of Outer Space, the 1981 arms control and disarmament issues considered by the Conference on Disarmament and by the General Assembly, and some of the issues raised at the International Telecommunication Union (ITU). The organizational structure of Intersputnik receives special treatment.

The book identifies basic principles and rules of international space law and recites important provisions of key international agreements. Soviet policy approaches can be identified, even though the currency of some of them is open to doubt. Although the book was published in 1984, very few events since 1982 are mentioned. Several passing references are made to Unispace-82, but no attention is called to the revised language of Article 33 of the 1982 ITU Convention. Unlike the Piradov book, this work refers to a large number of writers living in nonsocialist countries. Jenks's 1965 book receives special notice. However, reference to Western professional analyses published after 1976 is almost entirely absent.

The volume is by no means a comprehensive assessment of existing international space law and policy trends. Nonetheless, all readers are advised in the introductory chapter that factors influencing the evolution of international space law are the "objective needs of states, and specifically, . . . such factors as changes in the correlation of strength on the international scene, the foreign policies of states, and world opinion, to mention only a few" (p. xiv).

These factors unquestionably are relevant to the many informal and formal exchanges that have taken place between the United States and the Soviet Union since 1983 on the presence of armaments in the space environment (outer space per se, the moon and other celestial bodies). Piradov, in 1976, prior to the 1977-1979 negotiations between the two countries relating to the presence of ASATs in outer space, called attention to the ban on militarization of the space environment. Zhukov and Kolosov accept the fact that Article 4, paragraph 1 of the 1967 Principles Treaty outlaws the presence of nuclear weapons and weapons of mass destruction in orbit around the Earth. In their view, demilitarization results from banning activities that pursue military aims in peacetime, and that demilitarization can be partial, as above, or total, e.g., by banning all activities pursuing military aims in peacetime in the entire space environment.

They then go beyond Piradov by adding the concept of neutralization of the space environment, namely, the total or partial exclusion of these areas from the sphere of military operations in the event of armed conflict. In their view, the 1967 Treaty and other agreements have established a regime of total neutralization and demilitarization of the moon and other

it is to be hoped that the superpowers will be able to identify the reciprocal necessities that are inherent in meaningful international relations. As these relationships respecting both the commercialization and the militarization of the space environment are identified and more fully appreciated, there may be a resumption of the earlier progressive development of international space law. In making an appraisal of the future, the Zhukov-Kolosov book should be read with care.

CARL Q. CHRISTOL
University of Southern California

Responsabilidad Internacional por daños transfronterizos. By Alonso Gómez-Robledo Verduzco. Mexico: Universidad Nacional Autónoma de México, 1983. Pp. 184.

Alonso Gómez-Robledo's study on international liability for transfrontier damages is a valuable contribution to the field of environmental law which, since 1972, has challenged international scholars.

Even though the author gives an overall view of state practice and the related literature, one realizes, after reading the first three chapters, that Gómez-Robledo's aim is to establish a context for the offshore oil spill of Ixtoc-I, which is studied in chapter 4.

In the first two chapters, Gómez-Robledo analyzes the *Trail Smelter* case, the *Lake Lanoux* case and the *Corfu Channel* case, together with the theories put forward by various authors, especially those of Pierre-Marie Dupuy, "probably the best current authority on the subject" (p. 92). The *Trail Smelter* case is studied in detail (pp. 31-47) since the author believes that it takes us to what has been considered the *locus classicus* of international law principles on transnational pollution. *Trail Smelter* is an important precedent in the field of air pollution, but one must realize that it does not reflect the new philosophy on pollution accepted since the Stockholm Declaration of 1972. It marks a nadir in air pollution judgments, and if we were to apply its principles to the sea, rivers and lakes, we would be taking a number of steps backward.

In Chapter 3, Gómez-Robledo tackles the very controversial issue of international liability for injurious consequences arising out of acts not prohibited by international law and points out that "the damages which may result from the contemporary technological development raise the problems of liability for acts which are not illicit *per se*" (p. 55). There is no doubt that the evolution of this problem will depend on the results reached by the International Law Commission, where Robert Quentin-Baxter's fifth report (1984) has begun to open up new horizons. The importance of this chapter is obvious, even though inconclusive, so much so that it ends up with the German-Swiss negotiations on the Fricktal region, which in the long run represents the unacceptable right to pollute, that is, the *pollutant-payer* principle.

As mentioned above, the first three chapters are clearly intended to present the Ixtoc-I incident in a favorable light, and the U.S. Foreign

restrictions on foreign investments in most of the countries surveyed. Indeed, they conclude that a comparison of the 1981 and 1982 reports creates "the impression . . . that restrictions on foreign investment are growing" (p. vii).

Investment Regulation Around the World is a desk book that attempts to do nothing more than present a worldwide overview of the restrictions with which it is concerned. As such, it is of use to those who have a need for a superficial understanding of the existing situation in a particular jurisdiction before seeking to explore the problems in that jurisdiction in greater depth. It is a useful contribution to some types of international business management and perhaps even to some types of law libraries. However, it does not purport to be a scholarly or an in-depth discussion of the types of restrictions with which it deals.¹ This can be illustrated by reference to the section on the United States. The information on "Banking and Insurance" is contained in two sentences: "Restrictions exist primarily at the state level. For example, only certain states currently allow foreign directorship and operation of insurance companies" (p. 303).

This description of banking and insurance regulation in the United States says almost nothing. It does not in any way suggest the complexity of banking regulations that exists at both the federal and the state levels. Moreover, it does not suggest the many other types of regulations that are imposed on insurance companies, in addition to those with respect to directorships and foreign operation.

Investment Regulation Around the World is a starting point from which one may obtain some sense of a national environment with respect to direct investment from abroad. Used intelligently, it should be a useful tool; used as a definitive answer to questions concerning significant restrictions and regulatory controls, it could be a dangerous instrument.

ROBERT B. VON MEHREN
Board of Editors

Emerging Financial Centers: Legal and Institutional Framework. Edited by Robert C. Effros. Washington: International Monetary Fund, 1982. Pp. xvi, 1150. \$35.

This lengthy book is intended to set forth the legal and institutional frameworks of the financial systems of seven developing countries. The seven countries—the Bahamas, Hong Kong, the Ivory Coast, Kenya, Kuwait, Panama and Singapore—were selected as representing "burgeoning financial centers" (more commonly described as "offshore banking centers") in distinct geographical regions. A single chapter is devoted to each country. Each chapter consists of a 10–20 page introductory essay or description of the principal financial institutions, particularly the monetary authorities, of the subject country. This is followed by the texts of

¹ The guide contains no footnotes and very few citations to regulations, decrees or other types of governmental action.

the principal monetary and banking laws and regulations. For example, a 20-page introduction to the financial system of Hong Kong is followed by three hundred pages of banking ordinances dating from 1895 to 1980. The introductory essays are more descriptive than analytical; the authors do not attempt to evaluate the overall effectiveness of the systems discussed, or the wisdom of decisions by monetary authorities.

The chosen format results in a curious book. Although advertised as a discussion of legal frameworks, the introductory essays are written in almost every case by IMF economists. This accounts not only for the lack of critical evaluation (due largely to a reticence to criticize IMF member governments), but also for a rather sterile "legal framework" in which there is little true legal analysis. A brief description of financial institutions, a summary of principal monetary policies and a listing of the texts of banking laws may provide some of the elements of a legal framework, but they do not constitute the type of legal analysis that an international lawyer might expect.¹ Furthermore, the book lacks a comparative chapter that would help the reader to evaluate either the overall phenomenon of offshore banking centers in Third World countries, or to compare seriously the experiences of these countries. At the very least, the authors might have been asked to follow the same outline form in their essays, which would allow the reader himself to make useful comparisons. Finally, one must question the lasting value of publishing in hardbound form the texts of banking laws, which are no more written in stone than the laws on other subjects.

Despite these criticisms, this book is potentially useful for several purposes. Read in conjunction with the IMF's own *Annual Report on Exchange Arrangements and Exchange Restrictions*, this book will provide a short introduction to the financial systems of the seven countries. Beyond that, for the expert who is willing to work hard, there are interesting comparisons and observations to be made from the essays and compilations of laws contained in this collection.

STEPHEN ZAMORA
University of Houston

Courts and Free Markets: Perspectives from the United States and Europe. 2 vols.

Edited by Terrance Sandalow and Eric Stein. New York: The Clarendon Press; Oxford University Press, 1982. Pp. 600. \$39.50/vol.

Courts and Free Markets is a collection of essays that analyze the roles of the U.S. Supreme Court and of the European Court of Justice in promoting the integration of internal markets in the United States and the European Communities. The essays examine five issues faced by every

¹ On the differing approaches of economists and international lawyers, see J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* xvi (1977).

political entity in which there is a split of governmental power between central and local authorities: the limits on the central authority's legislative power, the power of the central authority to preempt local regulations, its ability to control local taxes that discriminate against nonlocals, the extent to which local restrictions on the movement of goods within the political entity are tolerated and the extent to which the movement within it of natural and legal persons may be limited. The essays, each of which describes the development of the law applicable in either the United States or the European Communities, were prepared to serve as a basis for comparing and contrasting developments in those two entities at a conference held in Bellagio, Italy, in 1979. The conference was attended by a select group of U.S. and European law professors and judges, as well as senior legal officials of the European Communities.

The volumes make two significant contributions to legal literature. First, although conceived as part of a comparative law study, the individual essays stand by themselves as excellent analyses of U.S. and European law in their subject areas, particularly in analyzing the historical development of the law. Indeed, certain of the individual essays on U.S. law constitute major works of scholarship on important subjects not often written about in recent years. Especially noteworthy in this regard are Professor Rosberg's work on the free movement of persons within the United States, Professor Blasi's study of the interstate commerce clause and Professor Cohen's essay on preemption. On Community law, the works of Professor Schermers on the free movement of goods and of Professor Waelbroeck on preemption are particularly fine analyses of their topics.

The principal goal of the work, of course, is to serve as a basis for comparing the role of U.S. and European courts in promoting economic integration, and *Courts and Free Markets* meets this goal by providing a fascinating study of the sometimes similar and sometimes different treatment given to analogous problems in the two legal systems. One of the most interesting conclusions that can be drawn from the work is that the experience of the European Court is quite similar in many respects to that of the U.S. Supreme Court. The important role played by the two courts in promoting economic integration was probably unanticipated by their respective founding fathers. Nonetheless, each court quickly established itself as the final arbiter of the limits of the central authority's power in its respective legal system and played a major role in upholding that power in the face of challenges by local authorities and in promoting a unified market. The rules adopted by the two courts in so doing are not identical, but it is striking that they are the result of similar analytic approaches to basic problems faced in integrating markets. The variances in the rules can often be explained by the basic differences between the United States, a sovereign nation composed of essentially subordinate states, and the European Communities, a common market composed of sovereign nations. For example, in the attempt to create a unified internal market where none existed before, the European Court is probably less tolerant of local measures that impinge on the free movement of goods across national

frontiers, even if arguably not discriminatory, or that intrude on an area in which the Communities have explicit legislative authority. In the United States, on the other hand, where a national market has existed for two hundred years and the supremacy of the federal Government is well established, only measures discriminating in favor of local residents are likely to be struck down, and the Supreme Court is somewhat more tolerant of nonconflicting state regulations in areas of federal competence (see pp. 24-30, 33-36). Even with these differences, it remains instructive to see how the two courts have dealt with similar issues. As U.S. Supreme Court Justice Potter Stewart, one of the conference participants, notes in his foreword: "Students of each system may thus acquire enhanced understanding of the problems and prospects of their own system and, perhaps, the potential for achieving beneficial change within it."

The one criticism that can be leveled at the work is that the similarities and differences between U.S. and Community law are largely left for the reader to unearth for himself since the proceedings of this 3-day conference, which were devoted to raising and analyzing those similarities and differences, have not been published. This is hardly a serious fault. To some extent it is mitigated by the excellent introductory essay by the editors, who provide extensive background material to aid the understanding of those not familiar with the structure of the European Communities and who, in addition, highlight certain of these similarities and differences. Moreover, the general high quality of the well-organized individual essays, which are grouped by subject, make the process of comparison relatively simple, except for the laziest of readers.

All in all, *Courts and Free Markets* can be highly recommended, both because of the high quality of the individual essays and because of the opportunities for comparative analysis that they provide.

WILLIAM J. DAVEY
University of Illinois
College of Law

Economic Sanctions: Ideals and experience. By M. S. Daoudi and M. S. Dajani.
London, Boston, Melbourne and Henley: Routledge & Kegan Paul,
1983. Pp. 263. Index. \$24.95.

This careful and scholarly examination of economic sanctions as actually applied by international organizations, state alliances and individual states is a welcome addition to a diminishing literature on a subject that no longer seems to stir the passions of international observers. It is valuable as a thoroughly documented account of sanctions (from the League of Nations to the U.S. actions in respect of the Siberian pipeline) and for the evidence of failure that has resulted in the present negative perception of their utility. The book is also remarkable for its admirable and ambitious attempt to explain the tarnished image of economic sanctions through the framework of "paradigm." However, the intended marriage of sociology and history does not produce a sociological theory of economic sanctions

as actually applied because the authors do not effectively unite the two disciplines. The reader must synthesize historical and sociological sections for himself—and puzzle out unexplained diagrams in the process.

“Paradigm,” as introduced by Thomas Kuhn in his demanding *The Structure of Scientific Revolutions* (1962), may be defined as a common set of beliefs shared by scientists upon which they predicate explanations of physical phenomena. The discovery of new facts tends to undermine accepted scientific views and results in a period of instability until the emergence of a new theory that incorporates these data. Science thus ascends toward truth on a ladder of paradigms.

So it is, the authors hypothesize, with the social scientist’s view of economic sanctions. Following the Great War, a desperate hope was reposed in the League of Nations, and particularly in its provisions for collective security based upon the threat or use of economic sanctions. After an initial flush of success when Yugoslavia withdrew from Albania in anticipation of League action (1921), the refusal to apply sanctions at all against Japan in Manchuria (1931) or to implement them effectively when Italy invaded Ethiopia (1936) resulted in the widely held view that nationalistic self-interest greatly limited the effectiveness of both international organizations and the economic option in conflict prevention and resolution. The UN experience, and that of various state coalitions and individual states, strengthened the emerging negative view.

In perhaps its most notable attempt to employ economic sanctions, the United Nations adopted mandatory limited sanctions against Rhodesia in 1966. The Smith Government may have been pressured, but it found sufficient trading partners to survive. Likewise, the 1973–1974 OPEC oil embargo may be said to have failed in that it did not result in the withdrawal of Israel from Arab territories occupied in the 1967 war. Finally, to select recent examples of a single state’s attempts to influence another state’s behavior, the U.S. grain embargo and attempts to prohibit or discourage participation in the Siberian pipeline construction are popularly viewed as failures: the costs to U.S. farmers and industry and the political stress among the Western allies were evident and real. Meanwhile, the Soviets continued their occupation of Afghanistan and suppression of Solidarity.

Are we to conclude from experience that economic sanctions do not work? The authors are clear in their rejection of this view but somewhat less lucid in adducing the evidence upon which this conclusion rests. There appear to be two general lines of reasoning. First, the suggestion is made that the contemporary paradigm encapsulates a more ambitious standard of success than is warranted by the facts: if economic sanctions have been ineffective in coercing a return to the status quo, they have failed only in respect of that typically expressed objective. In fact, the actor usually is willing to settle for a good deal less. Thus, the partial sanctions against Italy weakened that country’s economy, the embargo against Rhodesia probably hastened the decline of the Smith Government, OPEC emerged as a world political and economic power, and even the Soviet Union was

inconvenienced by the U.S. grain embargo and Siberian pipeline actions. In other words, there was some "effect," although these instances are not persuasive evidence that economic sanctions are "effective," however that term is defined.

The authors identify a second value of economic sanctions:

[T]he real questions are not whether economic sanctions have been successful in the past, nor to what extent they have been successful in forcing target nation or nations to comply, but rather whether they prevent the outbreak of wars, and if so, how and to what extent, and whether in the event of a conventional war, they can accelerate the termination of hostilities [p. 161].

This is a point worth pursuing. If economic sanctions really do prevent or hasten the conclusion of armed conflict, the argument concerning their "effectiveness" is as meaningless as the authors assert it to be. The old paradigm resulted from an experiment motivated by the certain horrors of another war. Are there data to support a careful hypothesis that economic sanctions may provide a means to avoid thermonuclear catastrophe? Alas, the authors do not avail themselves of this opportunity to become architects of a "new" new paradigm.

VICTOR E. FITZMAURICE
Of the California State Bar

The Transnational Law of International Commercial Transactions. Edited by Norbert Horn and Clive M. Schmitthoff. Deventer: Kluwer, 1982. Pp. xii, 468. Index. Dfl.187.50; \$75.

This volume is a small encyclopedia of international trade law. It begins with consideration of whether it should be unified by convention with mandatory norms or left to the autonomy of the parties. It ends with studies by experts on trends in drafting frequently used types of contracts (letters of credit, licensing agreements, turnkey contracts, international lending agreements and management contracts), securing transactions and use of trade terms. An appendix provides the texts of the 1980 Vienna Convention on Contracts for the International Sale of Goods, Incoterms 1980, the ICC Uniform Rules for Contract Guarantees and the Conditions of Contract (International) for Works of Civil Engineering Construction.

The initial debate over uniform mandatory rules versus party autonomy is evenly divided between those who prefer to leave parties free to do what they wish and those who perceive a public interest requiring the formulation of mandatory clauses. Authors appear to accept as reasonable the compromise adopted by the 1980 Vienna Convention, which gives parties a limited choice: either the norms of the Convention or designation of some national conflict-of-law rules.

For counsel to firms negotiating with state traders, this would seem to suggest adoption of the Convention rules, as conflict-of-law norms usually throw the contract under the national law of the state trader, even though

the arbitration is set in a third state. Practice to date has favored choice of the substantive law of a third state to avoid application of the state trader's national law through application of a third state's conflict-of-law norms. Until the Convention comes into force and is interpreted in practice, counsel will need to consider the risk taken in selecting one or another alternative.

JOHN N. HAZARD
Board of Editors

Foreign Trade, Investment and the Law in the People's Republic of China. Edited by Michael J. Moser. Oxford: Oxford University Press, 1984. Pp. 341. Index. \$34.50.

In this much awaited and needed first contemporary text on the new economic laws of the People's Republic of China (PRC) and their relation to foreign trade and investment, Michael Moser, as editor, has made a considerable contribution to this rapidly growing area of Chinese law. The book is divided into 12 chapters, each devoted to a separate area of the subject, prepared by various legal experts knowledgeable in the field. As a result, although to a degree it falls short with respect to full integration of the contents, the publication is of decided value in encompassing material that in the past had to be sought out in various trade journals and government releases, as well as a limited number of volumes containing texts of Chinese laws, directives and regulations. And, although the composition is deliberately general in nature, citation is given at the end of each chapter to the original material or sources relied upon for those who wish to pursue more extensive research.

The 11 contributing authors, of which Mr. Moser is one, are all recognized and, for the most part, practicing lawyers specializing in Chinese trade and investment law. Their names read like a *Who's Who* in the field. Moser displays considerable talent in directing the expertise of his authors toward the most currently relevant legal topics affecting trade with mainland China. Included are subjects involving regulation of foreign trade, the newly renovated tax system, the Special Economic Zones (Guangdong in particular), offshore oil exploration requirements, contract law, banking and finance, patent and trademark law, legal aspects of representation and dispute resolution, as well as technological transfers to and foreign investments in China.

Almost all of the authors acknowledge that there are still serious gaps in the interworkings of various Chinese ministries and agencies and the implementation of regulations within their jurisdiction. But, as the editor carefully explains in the introduction, the aim of the book is "to provide persons having an interest in Chinese affairs with an overview of the current status of China's efforts to establish a legislative framework for the conduct of business affairs." Those requiring more extensive study will have to await some future publication of a compendium on Chinese economic law. Suffice it to say that within its 330 pages (excluding the

appendix), Moser and the Oxford University Press have brought forth a very useful and pragmatic legal study attuned to the present state of Chinese trade law.

The only serious criticism that might be raised pertains to the too brief introduction, which is directed toward tying together the diverse chapters of the book. The introductory material should have been expanded to cover the general legal developments in the PRC since the Cultural Revolution, as well as to point out the overall importance of the Chinese Communist Party in directing the drive for increased foreign trade within its mandated policy of the Four Modernizations. It should also have been explained how the Five-Year and One-Year Plans of the entire economy are determined, rather than to leave this most important subject to random observations by several of the authors.

ROBERT BENNETT LUBIC

The American University School of Law

Multinational Enterprises and the OECD Industrial Relations Guidelines. By Duncan C. Campbell and Richard L. Rowan. Philadelphia: Industrial Research Unit, The Wharton School, University of Pennsylvania, 1983. Pp. xii, 289. Index. \$22.

The past decade has witnessed a flurry of activity within international organizations, in particular the UN Centre for Transnational Corporations, towards the development of global and comprehensive codes of conduct for multinational enterprises. Experience has shown that endeavors of this kind are difficult to realize owing to the inevitable ideological, economic, social and political differences that exist between member states of world organizations.

The experience of the OECD Guidelines for Multinational Enterprises, however, has generally been viewed as positive. The success of the OECD Guidelines can be fairly attributed to the basic commitment of the 24 OECD member states to a market economy and a clear understanding from the beginning that the Guidelines were to be of a voluntary nature.

Although the OECD Guidelines came into existence in 1976, little attention has been paid to them in scholarly circles.¹ *Multinational Enterprises and the OECD Industrial Relations Guidelines*, by Professors Campbell and Rowan of the Wharton School, fills this gap in the literature by providing an excellent detailed study of the section of the OECD Guidelines that has occupied most of the OECD's attention: the paragraphs on industrial relations.

A most helpful introduction to their study begins with a concise outline of the structure and roles played by the principal actors involved with the

¹ Professor R. Blanpain's two books on the OECD Guidelines provide a notable exception: R. BLANPAIN, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: EXPERIENCE AND MID-TERM REPORT 1979-1982* (1983); R. BLANPAIN, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS, 1976-1979: EXPERIENCE AND REVIEW* (1979).

OECD Guidelines: the OECD Committee on International Investment and Multinational Enterprises (CIIME), which is composed of government delegates from the OECD member countries; the Business and Industry Advisory Committee to the OECD (BIAC); and the Trade Union Advisory Committee to the OECD (TUAC) (the latter two groups respectively present to the OECD the views of business and the trade union movement in the industrialized world). In contrast to the tripartite structure of the International Labour Organisation (ILO), BIAC and TUAC act in a consultative capacity only.

A brief summary of the major developments concerning the OECD Guidelines from their formulation in 1976 until 1982 follows. These include TUAC's requests for clarifications and interpretations of the industrial relations guidelines with respect to illustrative "cases" arising from the conduct of certain multinationals, the 1979 OECD Review and the 1982 Mid-Term Reports on the Guidelines.²

The section on industrial relations of the OECD Guidelines for Multinationals consists of nine paragraphs, which establish standards of practice that enterprises should follow. These paragraphs are preceded by a crucial "chapeau" clause that places these standards "within the framework of law, regulations and prevailing labour relations and employment practices in each of the countries in which they operate." Campbell and Rowan quite properly focus on the meaning of this "chapeau" clause early in their study since the question of its relationship to the nine paragraphs of the industrial relations section has engendered a controversy as to the obligations of multinational enterprises under the guidelines, which should be of interest to anyone concerned with the formulation and application of international codes of conduct.

The OECD Guidelines for Multinational Enterprises were clearly not intended to impose legal obligations on multinational enterprises.³ Nevertheless, the issue of whether the industrial relations section may be regarded as a supplement to national law, albeit of a nonlegal character, has been a subject of considerable controversy. TUAC contends that the Guidelines may be contravened even in cases where the multinational enterprise has acted in conformity with national law and practice. Campbell and Rowan point out, however, that the adoption of such an interpretation would run counter to the basis upon which corporate support for the Guidelines was given, namely, that they necessarily derive their content solely from national laws and practices.

The issue is important in that acceptance of the contentions of TUAC would lead to interpretations that certain provisions of the industrial relations section (e.g., on plant closures, para. 6, or on collective bargaining,

² The OECD has recently completed another review of the 1976 OECD Guidelines. OECD, *THE 1984 REVIEW OF THE 1976 DECLARATION AND DECISIONS* (1984).

³ "Observance of these Guidelines is voluntary and not legally enforceable." OECD, *INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES* 15 (rev. ed. 1979) and *GUIDELINES FOR MULTINATIONAL ENTERPRISES*, para. 6.

para. 9) would require transnational collective bargaining in certain cases. The adoption of such a position would be anathema to the international business community, which has always emphasized the necessity, on both legal and practical grounds, of maintaining the locus of industrial relations at the local/national level.

Starting from the premise that the OECD Guidelines cannot be interpreted to supplement national laws and practices, Campbell and Rowan proceed to analyze whether the conduct of multinational enterprises in those disputes that have come to the attention of the OECD-CIIME was in conformity with the industrial relations guidelines. This analysis is organized in a paragraph-by-paragraph examination of the industrial relations section, which conveniently integrates an explanation of their content with a discussion of the "cases" pertaining to the paragraphs that have come before the CIIME.

Given the diversity of national industrial relations systems, the industrial relations guidelines are expressed in rather general terms. The majority of the paragraphs of the industrial relations section have not occasioned much controversy. Provisions such as those concerning employment discrimination (para. 7) or the employment and training of the local labor force (para. 5), for example, do not involve the issue of transnational collective bargaining and have therefore not been the subject of dispute. Those guidelines that imply the involvement of the parent in industrial relations, such as paragraph 9, which specifies that enterprises should "enable authorized representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives of management who are authorized to take decisions on the matters under negotiation," bring into question the relationship of the "chapeau" clause and have therefore been hotly contested.

The study correspondingly devotes more time to these provisions and in particular to paragraph 9. The chapter on this paragraph exemplifies the skill of the authors in placing the debate over the meaning of the OECD Guidelines within the overall context of industrial relations developments. Thus, the chapter opens with a discussion of whether or not industrial relations are decentralized in a multinational, with the authors convincingly contending that the industrial relations function is indeed decentralized. This discussion is followed by an analysis of attempts, in practice and via legislation such as proposed EEC legislation, e.g., the Vredeling proposal, to develop transnational bargaining. It is only after giving this background that the three "cases" involving paragraph 9 that have been submitted to the OECD-CIIME are analyzed.

The great merit of this book is the authors' success in integrating their analysis of the industrial relations section of the OECD Guidelines into a consistently clear discussion of the major industrial relations issues that underlie the debate among business, the trade union movement and the OECD. These issues include whether investment decisions can be properly classified as coming within the ambit of industrial relations or whether only the effects of such decisions are proper subjects for discussions with

unions, and the meaning of the phrase "management representative authorized to take decisions."

By masterfully combining their study of the industrial relations section of the OECD Guidelines with an analysis of their relationship to national law, an overview of the research on major industrial relations issues and a discussion of developments in other international forums such as the EEC and the ILO, Campbell and Rowan have provided a study that will enable legal scholars, industrial relations experts and in-house counsel for multinational enterprises, among others, to grasp the importance of the OECD Guidelines for Multinational Enterprises in the continuing debate on the labor relations issues that have come into prominence with the rise of the multinational enterprise.

FRED EINBINDER
American College, Paris

The Status of Gibraltar. By Howard S. Levie. Boulder: Westview Press, 1983. Pp. xii, 258. Index. \$22.

Gibraltar has been an issue of contention between Great Britain and Spain for nearly three centuries. This book examines the historical background and present status of this dispute.

The physical size of the area in dispute is tiny (the Rock is 2.75 miles long, $\frac{3}{4}$ of a mile wide and 1,396 feet in height) but its location at the entrance to the Mediterranean makes it of strategic significance. Gibraltar is connected to mainland Spain by a low, narrow isthmus that separates the Mediterranean Sea from the Bay of Algeciras by about $\frac{1}{2}$ mile of sandy soil. This physical connection in itself makes Gibraltar significant to Spain. Gibraltar has been in British possession since 1704 and during much of that time Spain has attempted to regain sovereignty of the Rock.

Dr. Levie cites two aphorisms that are frequently stated with respect to Gibraltar: the first, that it was a possession that "Spain did not value until she had lost it"; and the second, that since the day it became a British possession, "Gibraltar has been a thorn in the side of Spain."

This book should have a wide appeal. It will be of interest by virtue of the historical associations of the Rock of Gibraltar as well as because of the strategic importance of the Rock's position. The Rock has been a subject of myth and legend and a synonym for strength and stability.

Levie traces the history of Gibraltar from its early period (prehistory to A.D. 711), to its Moslem period (711-1462), to its Spanish period (1462-1704). The bulk of his book, however, deals with the relationship between Spain and Great Britain. A great deal of attention is given to the Treaty of Utrecht between Spain and Great Britain in 1713, which involved the cession of Gibraltar from Spain to Great Britain and the negotiations that established this Treaty. Levie's treatment of this period and the negotiations involve a detailed examination of many documents not previously given such extensive treatment, which offers a previously neglected insight into the dispute.

The book discusses how the British, unintentionally or otherwise, have violated the provisions of the Treaty of Utrecht and how they have encroached upon Spanish territory, and how the Spanish have attempted to retaliate.

The book concludes by examining the way the United Nations has dealt with Gibraltar and shows that it remains an issue of significance in the Organization. In 1966 Spain called on Britain to give "substantial sovereignty" of Gibraltar to Spain (which appears to have UN support) and imposed a partial blockade. In 1967 Gibraltar residents voted 12,138 for remaining under Britain and 44 for returning to Spain. In May 1979, a new constitution gave an elected House of Assembly more control in domestic affairs. Nevertheless, a UN General Assembly resolution requested that Britain end Gibraltar's colonial status by October 1, 1969. October 1, 1969 brought no change in the status of Gibraltar.

Levie suggests a possible resolution designed to placate both Spain and Great Britain. Basically, his proposal would transfer sovereignty to Spain while assuring Great Britain an unhampered and continued military presence on Gibraltar for a considerable period of time (perhaps 99 years). Additional refinements apply to the residents and their status.

This book contains 10 appendixes—all of great interest. I recommend reading these first and then the text. This approach will either supply appropriate background or refresh one's memory and prepare one for the historical direction of the book. The historical foundation provided by this book will engage historians, political scientists and those interested in international legal subjects.

LINDA A. CARUSO

Of the District of Columbia Bar

Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym (Succession of States in Respect of Treaties in Contemporary International Law). By Renata Szafarz. Wrocław: Zakład im. Ossolińskich—Wydawnictwo, 1982. Pp. 412. Zł.240.

The rules governing the legal consequences of the replacement of one state by another have long been rather obscure. Only when decolonization brought about dramatic changes in the composition of the international community did the United Nations make a serious effort to clarify the law on the subject.

This book provides a thoughtful and in-depth analysis of the major treaty on succession, the Vienna Convention on the Succession of States in respect of Treaties, adopted by the UN Conference in 1978. Dr. Szafarz, a participant in both sessions of the conference on behalf of Poland, is intimately familiar with the *travaux préparatoires* of the Convention.

One of the main questions the author addresses in her book is to what extent the Vienna Convention reflects international customary law. As she explains in the introduction (p. 13), the question is crucial, because in

most situations the Convention will apply only if a successor state decides to become a party. Until then, the customary rules will govern. The Convention has been accepted slowly and is not yet in force.

The book consists of five chapters, concluding remarks (which were translated into English in lieu of a summary) and a bibliography (about three hundred books and articles in several languages are listed). First (ch. I, pp. 18-82), the author discusses the nature, legality and types of state succession. She identifies basic modes of succession to treaties, reviews doctrinal approaches from Grotius to O'Connell and presents the development of the law on succession and its codification. Szafarz notes (pp. 35-36) that despite the efforts of the Soviet Union and some other socialist countries, the concept of state succession resulting from a fundamental change of a socioeconomic order has not been included in the International Law Commission's draft articles. The Commission believed that the issue was too political to be dealt with in the Convention. The author approves of the fact that during the Vienna Conference no effort was made to revive the issue.

In subsequent chapters, the author analyzes three types of situations involving succession to treaties. First, the least controversial case of succession in respect of part of territory is discussed (ch. II, pp. 83-92). The author points out that the "moving treaty-frontiers" rule adopted by the Vienna Convention was one of the few rules well established before the codification took place.

Roughly one-third of the book is devoted to the newly independent states, a transitory phenomenon which, as the author admits, is already history (ch. II, pp. 93-230). Yet, it was this subject that produced the most heated debates at the Vienna Conference; the author's strong sentiments are discernible. She applauds the relevant Vienna provisions that tend to favor the principle of self-determination over the security of the international legal order (the underlying principle of the provisions is the tabula rasa or clean slate doctrine). Finally, the uniting and separation of states are carefully investigated (ch. IV, pp. 231-310). The author clarifies the rationale of the Vienna rules aimed at safeguarding the stability of treaty relationships in such situations. The special case of territorial treaties, in particular those establishing boundaries, is dealt with separately (ch. V, pp. 311-51).

Szafarz, like other socialist authors, looks favorably on the Vienna Convention which, in her view, "has achieved a proper balance between the interests of various successor states and the interests of the international community as a whole" (p. 375). The author believes that the Convention has already fulfilled its main task of effectively consolidating the law on the subject.

The book is a good, scholarly work, based on extensive research that accommodates both theory and practice. It makes a valuable contribution to our understanding of the complex legal problems attendant upon state succession.

MARIA FRANKOWSKA
Southern Illinois University School of Law

La Pratique marocaine du droit des traités (Essai sur le droit conventionnel marocain). By Hassan Ouazzani Chahdi. Paris: Librairie Générale de Droit et de Jurisprudence, 1982. Pp. 554. F.209.50.

This treatise is a revision and update of a prize-winning doctoral thesis presented at the University of Paris I in December 1977, and published under the direction of Professor Charles Rousseau. Its title does not reflect the full scope of the work, for it is a historical review of Moroccan treaty practice dating from 1060, together with an analysis of the competent government authorities and institutions involved in the treaty-making process.

The governing principle of the thesis is the continuity of the legal personality of the Sherifien Empire. In spite of the severe limitation placed on its treaty-making power during the French Protectorate,¹ 1912–1956, the Moroccan judicial order continued to function alongside the French. The Muslim and sovereign institutions of the empire remained in place. Principally, that meant the sultan, whose legitimacy is based on the principles of Islamic public law of the caliph as both temporal and spiritual head of the community.² The continuity of the sovereign's international legal personality is important, for it explains in large measure the Moroccan practice of presuming the continuity of treaties concluded prior to the Protectorate, as well as Morocco's agreement, under the terms of the diplomatic accords of successor devolution with France of May 1956,³ to assume treaty obligations made by France during the Protectorate.

Although Ouazzani Chahdi writes as an advocate for virtually all positions of Moroccan treaty interpretation, he does so with reason, always setting forth the best legal arguments. He displays a refined intellect. It is most evident when reference is made to the explosion of the first French atomic bomb at Reganne on Moroccan soil in February 1960. His attention is not focused on the morality of the act, but on the legal effect that Morocco's ensuing denunciation of the diplomatic accords of May 1956 had upon treaties involving third states (pp. 306–09).

The work is divided into three parts; the method of presentation varies with the contents of the materials, although it is rigorously classified in the French academic tradition. A preliminary part (pp. 17–165) begins with a historical survey of Moroccan treaty practice, which has been based on the principles of equality and reciprocity since the Middle Ages, and concludes with a comprehensive analysis of the forced and unequal treaties, bilateral and multilateral, that placed political and economic servitudes on Morocco, and eventually culminated in the French Protectorate. The first

¹ Article 6 of the Treaty of Fez, Mar. 30, 1912, states: "His Majesty, the Sultan, agrees not to undertake any act having an international character without the prior consent of the Government of the Republic of France."

² The present Alaouite dynasty—no relationship to the Alaouites in Syria—of King Hassan II dates back to 1640.

³ Article 11 of the French-Moroccan Diplomatic Accords of May 28, 1956, states: "Morocco hereby assumes the obligations resulting from international treaties concluded by France in the name of Morocco, as well as those which result from the international acts concerning Morocco, on which it has made no observations" (trans. in 51 AJIL 681 (1957)).

part (pp. 166–326) provides a comprehensive and comparative analysis of the law of state succession as applied by Morocco to preexisting treaties after its recovery of full sovereignty in 1956. The second part (pp. 327–456) concerns current treaty practice. Special attention is paid to the internal effect of treaties: the issue of primacy of treaty or domestic law. The author demonstrates his conclusion that Moroccan treaty law is dynamic and continues to evolve. This is not surprising, as lacunae exist in its law. Morocco is a developing country whose *mazhken* (central government) is well established and whose Constitution is silent on the issue of the supremacy of treaties. To his credit, the author fills such gaps in textbook fashion, with his cogent analysis of relevant legislative acts, case law and administrative practice clearly expressing the tendency to give primacy to treaty law. This part also provides a detailed review of technical procedures regarding signature, ratification, adhesion, reservation and publication of Moroccan treaties.

Ouazzani Chahdi's scholarship is impressive, and his research exhaustive. He has mined the government archives of Paris and Rabat, as well as the international institutions at The Hague and in Geneva. He uses such primary materials to clarify and amplify developing Moroccan treaty law.

The work is a valuable contribution to international law literature pertinent to the law of state succession, to the relation of treaty law to domestic law, and to Moroccan public law. The volume also contains a useful annex listing all international accords concluded by Morocco from 1955 through 1980. More important, the book will serve as a guide, providing insight into the future development of Moroccan treaty law.

JOSEPH P. MURPHY

Of the New York and Florida State Bars

Teoria Gier w Amerykańskiej Nauce o Stosunkach Międzynarodowych (Theory of Games in the American Science on International Relations). By Leszek Weres. Poznań: Instytut Zachodni (Western Institute), 1982. Pp. 181. Zł.95.

The mathematical theory of games fathered by John von Neumann and Oscar Morgenstern in 1944 in their classic *Theory of Games and Economic Behavior* was quickly adopted by the Pentagon, the think tanks and academic research institutes, and a vast and intricate literature analyzing interstate conflicts has since evolved. There has been a tendency to overlook the fact that Soviet and East European scholars have by no means remained unaware of this American scientific achievement. They have followed its course by reading translations and by studying the assessments that appear in their own original publications.

The book under review was written by a Polish political scientist who lived in this country in 1972–1973 as a Fulbright fellow and contacted the leading American theoreticians in this field (T. C. Schelling, K. W. Deutsch, A. Rapoport, et al.). He presents a systematic, detailed and clear

picture of the American theory of games as applied to interstate conflicts, embracing not only wars and confrontations but also diplomatic bargaining, as well as the creation and dissolution of coalitions.

It seems unnecessary to summarize the contents of this book. International lawyers have easy access to the wealth of American literature. The book is clearly intended as a textbook on the theory of games for the Polish intelligentsia. The author is a highly competent scholar, and he writes on a high scientific level in language that is dry, but detailed and precise. His arguments are logical and cogent, and his examples of conflicts abundant and telling.

What may be of some political interest are his comments on the American theory itself and the uses made of it by American experts and decision makers. He stresses its threefold role as (1) producing abstract, formalistic mathematical models, (2) furnishing prescriptions of rational action (its normative use) and (3) serving as a tool of psychological and sociological research (its experimental use). At the same time, he warns against incorrect or hasty and superficial application of the theory, which brings worse results than being guided by common sense alone (p. 33). Thinking in categories of winner and loser, victor and vanquished is a very dangerous and oversimplified approach to reality (p. 14). He strongly criticizes the following reasoning of American military strategists: the adversary *can* strike first, consequently I *ought* to do it, therefore he *will* strike first, which compels me to precede him. He compares it to an encounter of two paranoids (pp. 174-75). Rational action is likely to disappear in a stressful situation and at least the rules of the game may change during an escalating confrontation (p. 176). He questions the conviction of the moderate wing of game theoreticians that the capacity to destroy the adversary is necessary and sufficient to prevent him from initiating military action (p. 174). In a crisis of brinkmanship, the threshold may be crossed where the adversary becomes desperate and reacts irrationally (p. 82). The theory of games has so far not produced a satisfactory mathematical formulation of multi-(n)person games (p. 122) and is still not able to answer many important questions (p. 83). It is also noteworthy that the only in-depth case study contained in a separate 20-page chapter deals with the Cuban missile crisis of 1962.

The spirit of détente and global thinking pervade the book.

ALEKSANDER W. RUDZINSKI

Controlling Latin American Conflicts: Ten Approaches. Edited by Michael A. Morris and Victor Millán. Boulder: Westview Press, 1983. Pp. xiii, 272. Index. \$22.50.

This, its editors state, is the first book to deal exclusively with the control of actual and potential armed interstate conflicts involving Latin America.

Originally prepared by nine U.S. and Latin American scholars as a collection of papers for a Washington, D.C. meeting of the Latin American Studies Association in 1982, this book consists of a helpful, methodological introduction, 12 well-documented articles¹ and an extensive bibliography. Slightly more than half of its chapters are devoted to diplomatic, legal and political approaches to the problem. The rest covers its military dimensions. Not surprisingly, some of the authors are critical of the two extremes of U.S. policy toward the region: neglect and intervention.²

Leaving the current projection of East-West tensions to Central America and the Caribbean aside, the importance of this book is underscored by three little-known facts: (1) the population of the 33 nations of Latin America, now about 353 million and growing at the world's highest birth rate, already exceeds by more than 100 million that of the United States and Canada combined;³ (2) with more than 30 actual or potential armed interstate conflicts in the first 3 years of this decade, Latin America has been the world's most conflict-prone region; and (3) the southern land border of the United States, extending for more than 1,500 miles, has not only been practically undefended for a long time but, as such, is probably indefensible.⁴

In their introduction, the editors set forth the following taxonomy of five classes of conflicts for the region:

(1) *System Conflicts*, i.e., ideological disputes such as the 1983 invasion of Grenada and the continuing conflict between Nicaragua, on the one hand, and Honduras and Salvador on the other, usually arising out of attempts by regional proxies of the superpowers to impose opposing political or social systems.

(2) *Hegemonic/Influence Conflicts*, i.e., those involving the assertion of strength by regional powers or extraregional superpowers, e.g., the Falklands Islands/Malvinas conflict between Argentina and the United Kingdom which, though temporarily decided in favor of the United Kingdom by force of arms in 1982, is still awaiting final resolution.⁵

¹ Because of overlapping subject matter, the subtitle "Ten Approaches" is somewhat misleading.

² Since the declaration of the Monroe Doctrine in 1823, Central America and the Caribbean alone have been the target of more than 70 U.S. military operations without a declaration of war (p. 41).

³ STATESMAN'S YEARBOOK 1983-1984.

⁴ One cannot help but be concerned when one reads the following apocalyptic prediction attributed to Algeria's former President Boumedienne in *Le Point* (Paris) of Aug. 22, 1984, at 46: "Some day millions of people will leave their poor southern homelands to invade the relatively accessible areas of the northern hemisphere to survive."

⁵ One of the book's chapters, by Professor Ruben de Hoyos of Wisconsin University, analyzes the 7 years of active negotiations preceding the outbreak of the conflict. In the Sept. 19, 1984 issue of the *London Review of Books*, p. 21, Tam Dalyell, a Labour M.P., warns that the Argentine military has not "gone away" and that the United Kingdom has no option but to talk to Argentina about sovereignty over the islands.

(3) *Territorial/Border Conflicts*, i.e., those involving sovereign rights over land or water such as landlocked Bolivia's long-standing claim against Peru and Chile for the restoration of full access to the Pacific and the disputes between Guatemala and Belize and between Venezuela and Guyana.

(4) *Resource Conflicts*, such as the dispute over rights to the Beagle Channel between Argentina and Chile due mainly to the value of resources in the area in which they are located.

(5) *Migration/Refugee Conflicts*, i.e., those resulting from largely illegal shifts of population motivated by the perception of better political or economic conditions in the country of destination such as the so-called Soccer War between El Salvador and Honduras in 1969, caused by the illegal immigration of Salvadorans into less populated Honduras.

Interestingly, the editors omit mainstream economic conflicts from their list. Around the turn of the century, such conflicts frequently involved the use of force, including gunboats, for the collection of foreign indebtedness. However, the authors assume—one hopes, rightly—that they no longer pose such a threat in spite of Latin America's growing economic problems, which include current foreign indebtedness in excess of \$275 billion.

A helpful chart prepared by the editors shows that conflicts of the territorial type (41) followed by related resource-type conflicts (39) continue to outnumber all others. Since such conflicts involve measurable quantities, the editors believe they are generally more susceptible to solution by traditional legal and diplomatic means. Conversely, those in which non-measurable political elements dominate, such as system-, hegemony- and migration-type conflicts now prevailing in Central America, are likely to be less tractable by such means and, hence, more severe and longer lasting.

The chart also indicates that most conflicts are multi-causal and vary as to type in the respective perceptions of the opposing parties. For example, the Falkland Islands/Malvinas conflict has been perceived by the Argentines as a combination of the system, hegemonic and territorial types, whereas the United Kingdom perception has been that it is an amalgam of the territorial and resource types of conflict.

How can control of conflicts in the region be improved? Predictably, the book's authors on the military as well as nonmilitary aspects of the problems agree that, in the first place, a more effective network of institutions and treaties for conflict management in the region is needed.

On the diplomatic-political side, Juan Carlos Puig, Argentina's Foreign Minister in 1969 under the Campora administration and Carlos Moneta, a consultant to SELA, the organization devoted to harmonizing the Latin American economic system, agree in separate chapters that the role of the Organization of American States (OAS) as the region's principal peacekeeping organization is declining, along with the influence and

disciplining strength of the United States⁶ and the perception of a broad community of interests in the hemisphere, as shown in the Falklands/Malvinas conflict. At the same time, the countries of Latin America have become increasingly autonomous. Since the OAS alone can no longer be relied upon as the mainstay for keeping peace in the Americas, the authors advocate the addition of a new, purely Latin American policy coordination and peacekeeping unit. That unit would serve as a center of conflict resolution and consensus building among the Latin American nations while the OAS would focus its efforts on the resolution of hemispheric security problems and U.S.-Latin American conflicts.

Another of Puig's proposals in his chapter on "Current Juridical Trends and Perspectives" is the use of plebiscites to counteract the potentially destabilizing effect of unpopular conflict resolutions. He suggests that not only treaties covering compulsory conflict-resolution procedures be approved in advance by plebiscite but also subsequent mediators' proposals thereunder. Only if such proposals were voted down by plebiscite would conflicts be submitted to compulsory resolution. He lauds the region's most important multilateral procedure for conflict resolution, the Bogotá Pact of 1948 (American Treaty of Pacific Settlement) with its Inter-American Committee on Peaceful Settlement, as "perfect" from a normative view but deplores its practical inefficacy due to the large number of reservations made by its signatories, including the United States (p. 13), which has not yet ratified it.⁷ Some of these reservations, he claims, might not have been made had the Pact been approved by plebiscite.

Also intriguing, though faintly unrealistic, is Puig's recommendation that a "deideologized" restatement of international law applicable to inter-American relations be prepared. He believes that such a restatement, free of bias favoring extraregional nations in which such law was developed, would help build confidence in compulsory means of conflict resolution in Latin America. It would be interpreted and applied by the long-proposed Inter-American Court of Justice.

Less controversial and perhaps somewhat easier to implement are his suggestions for enhancing objectivity in the resolution of interstate conflicts by a more open and rigorous recruitment procedure for international lawyers charged with this work⁸ and by publicizing the issues through dissemination of the pleadings and public debates of representatives of the parties involved.

⁶ In his chapter on conflict control in South America, Professor Augusto Varas of the Latin American Faculty of Social Sciences in Santiago, Chile, expresses the belief that the United States under the current administration will reverse the decline of its influence in the region. But this, he believes, would in turn lead to further conflict and intraregional competition. An effective system of conflict resolution, he claims, depends on the ability of South American countries to reduce U.S. intervention in the area (pp. 82 and 84).

⁷ Nor, Puig points out, has the United States ratified any other regional treaty containing a degree of compulsion in jurisdictional procedures, e.g., the Treaty of Compulsory Arbitration of 1902, the Protocol for Progressive Arbitration and the Pact of San José de Costa Rica of 1978 (American Convention on Human Rights).

⁸ Citing Professor Leo Gross's "Conclusions" in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 744 (1976).

The primary concern of the book's authors on the military aspects of conflict control is over the proliferation of military capability within the region. Latin America remains the only populated nuclear-free zone in the world (p. 124) and spends relatively moderate sums on the military in Third World terms (p. 123). Argentina, Brazil, Cuba and Guatemala, they point out, have been moving from imports to the domestic manufacture of arms; Brazil, the region's premier military power, is progressing beyond self-sufficiency to a position as the Third World's leading arms exporter. Both Argentina and Brazil, the former also being the region's largest source of uranium, are about to acquire a nuclear weapons potential (p. 139).

At the same time, the hemisphere's key security agreement, the Rio Pact of 1947 (Inter-American Treaty of Reciprocal Assistance of 1947, as amended by the San José Protocol of 1975), has been awaiting full ratification for almost 40 years. Likewise, the Treaty of Tlatelolco of 1968, banning nuclear weapons from the region, has yet to be ratified by Argentina, and though ratified by Brazil and Chile, is not yet in effect with respect to these countries (p. 87). Finally, with respect to conventional arms limitation there exists only an eight-nation regional understanding—not even an agreement—the 1974 Declaration of Ayacucho.

Beyond urging formal as well as substantive implementation of these and other supplementary accords, the authors strongly support democratic government under civilian control as the best guaranty of peace within the region, in part, as Varas points out, because of the military's propensity to favor military over diplomatic solutions.

Finally, in separate chapters and on different levels, Millán and Morris address the problem of controlling U.S.-Latin American conflicts. Millán believes a joint U.S.-Soviet policy of restraint (i.e., nonintervention) in the region, coupled with a relaxation of tensions between Cuba and the United States,⁹ to be prerequisites for reducing the projection of East-West conflicts, particularly in Central America and the Caribbean. On a deeper cross-cultural level, Morris, in his closely reasoned chapter on U.S.-Brazilian conflict management, appeals for more empathy for basic Latin American values as a requirement for controlling future U.S.-Latin American conflicts. To this end, Morris suggests we try to understand that the Latin generally regards his economic rights as more important to his well-being than his civil rights during the process of economic development.

Considering its wealth of facts and recommendations, this collection of articles is a useful source of information and ideas for all those interested in hemispheric security problems, particularly those in our Defense and State Departments and our service academies. With the significant exception of material on the use of economic incentives in conflict management, this volume contains the major ingredients for a stimulating interdisciplinary textbook on the control of armed interstate conflicts in Latin America.

PETER C. O. SCHLIESSER
Of the New York Bar

⁹ He describes the nature of present U.S.-Cuban relations as "mutual paranoia" (p. 51).

Western Hemisphere Stability—The Latin American Connection. Edited by R. Daniel McMichael and John D. Paulus. Pittsburgh: World Affairs Council of Pittsburgh, 1983. Pp. xi, 138. \$7.

In his introduction, Jerry McAfee, former chief executive of Gulf Oil Corporation and chairman of the 1982–1983 Pittsburgh World Affairs Council project that resulted in this useful compendium of U.S. private sector thought on U.S.-Latin American relations, defines the threshold problem plaguing our relations with Latin America as follows: “how little, indeed, we really know about [the South] . . . and how very much more we need to learn” (p. vii).

Max Falcoff of the American Enterprise Institute explains the principal obstacle to our learning to understand Latin America with unusual candor. In a background paper for the political study panel of the project (the other two panels covered economic and security aspects), he complains about our neighbors to the South: “their innermost values, when we finally manage to catch a glimpse of them, do not—to put it mildly—appeal to us.”¹ Falcoff continues: “Thus we oscillate between trying to save the Latin Americans from themselves (to make them more like us) and cynically writing them off (and making the best deal possible with whatever junta is in power)” (pp. 62 and 63).

One discovers traces of this desire to make the Latins “more like us” in some of the recommendations of the three study panels. Generally, one also finds the importance of the East-West line of the political axis emphasized at the expense of its intersecting North-South line. Thus, the security panel concludes, not without a note of skepticism from some of its members, “what is needed is a ‘NATO mentality’ for the states of the Western hemisphere . . . to keep Soviet neocolonialism out of the Americas” (pp. 92 and 93); the economic panel pleads for building investor confidence through “reforms to deal effectively with corruption” (p. 16); and the political panel urges “U.S. policymakers to [ask] regional powers, particularly Mexico . . . frankly . . . if their own national interests are well served by their present foreign policy posture” (p. 53).

Occupying a position slightly to the right of the Kissinger Report (Report of the President’s National Bipartisan Commission on Central

¹ More than 160 years ago, Edward Everett, a Harvard professor, expressed similar sentiments in greater detail:

we have no sympathy, we can have no well founded political sympathy with [the Latin Americans]. We are sprung from different stocks, we speak different languages, we have been brought up in different social and moral schools, we have been governed by different codes of law, we profess radically different forms of religion. . . . How can our mild and merciful people, who went through their revolution without shedding a drop of civil blood, sympathize with a people, that are hanging and shooting each other in their streets . . . ? It does not yet appear that there exists in any of those provinces the materials and elements of a good national character [12 N. AM. REV. 432–43 (1821)].

Quoted in T. KARNES, READINGS IN THE LATIN AMERICAN POLICY OF THE UNITED STATES 18, 19 (1972).

America of January 10, 1984), some of the book's recommendations parallel and, in certain respects, exceed the conservatism of current administration policy toward Latin America.

The book ends with the text of a speech on "Peaceful Change in Central America" which Alexander Haig, then Secretary of State, was prevented by the Falkland Islands crisis from personally delivering to the Pittsburgh World Affairs Council on May 27, 1982. Referring to this hemisphere as having been, for two generations and more, "the world's best haven from war," Secretary Haig emphasized as one of President Reagan's basic foreign policy principles "that historic change should come peacefully and under the rule of law" and that "the U.S. cannot 'cure' Central America's long-standing problems by itself. Still less does our policy envisage the use of American troops, who are neither wanted nor needed" (pp. 133, 135).

The book's value lies primarily in its concise and generally balanced analysis of Latin America's principal problems and their causes through the findings and conclusions of the three study panels, as well as the three background papers on the economic, political and security aspects of our Latin American relations by Driscoll, Falcoff and Perry, respectively.

PETER C. O. SCHLISSER
Of the New York Bar

Anglo-Polish Legal Essays. Edited by William E. Butler. Dobbs Ferry: Transnational Publishers, Inc., 1982. Pp. xiv, 258. Index. \$19.50.

Professor William E. Butler (University College London) visited Poland at the height of the Solidarity movement. Hence, the willingness of Polish lawyers to make contributions to his *Anglo-Polish Legal Essays*. If he had gone to Poland after the pro-Soviet coup of General Jaruzelski, the Polish lawyers would have been more reluctant to cooperate for fear of imprisonment.

In February-March 1981 a colloquium was held at the Faculty of Law of Warsaw University and another at the Faculty of Laws, University College London. Those were the first interuniversity colloquiums of this kind between Poland and the United Kingdom.

Since most American lawyers are familiar with English law and jurisprudence, I shall, for the sake of brevity, dispense with the description of contributions by English lawyers except to list their names and topics: S. F. D. Guest, *Two Theories of Adjudication* (pp. 1-14); N. Lacey, *The Place of the Distinction Between Momentary and Nonmomentary Legal Systems in Legal Analysis* (pp. 15-32); A. E. Lewis, *Trespass and Iniuria* (pp. 93-116); D. Oliver, *The Changing Constitution in Britain* (pp. 129-54); R. C. Austin, *The Judicial Role in the Review of Policy Decisions* (pp. 173-90); and R. W. Rideout, *Trade Union Freedom in Britain* (pp. 191-208).

Butler, in his introduction, writes that

English and Polish law share in considerable measure either the principle or the fiction . . . that the courts . . . either do not and/or should not "make" law. . . . [However] socialist legal systems widely use binding "explanations" or "directives" . . . by supreme courts to inferior courts as a means of clarifying areas of the law where uncertainty or ambiguity is believed to exist [p. xii].

Contributions by Polish lawyers include *The Quest for Value-Oriented Jurisprudence*, by W. Suchecki. "In light of the changes taking place in the socialist countries, Poland being an example, one will be justified in concluding that chances for the development of value-oriented jurisprudence . . . have considerably increased as of late" (p. 53). *Polish Supreme Court Directives as Sources of Criminal Law* (pp. 55-74) is by S. Frankowski. He writes: "The concept of supreme court directives is known only in the socialist countries" (p. 55). "[I]n 1949 the directives were introduced into the Polish legal system" (p. 56).

[I]n 1969 a new Criminal Code was adopted by the Sejm [Parliament]. [Nevertheless] the court continued to promulgate its directives, which previously had been meant to adjust the pre-war Criminal Code to the new political and social conditions of post-war Poland. These directives are almost invariably followed by the judges. So these directives have become law-creating like statutory law. According to the Constitution the judges are independent, [but] their independence is violated by the absolutely binding directives. The supreme court encourages the courts . . . to increase the severity of punishment. The violation of directives may result in quashing or in changing the judgment. The current criticism [in 1980] points out that the directives usurp the law-making role of the Sejm and also violate the independence of judges [pp. 55-74].

J. Okolski, in *Current Developments in Polish Economic Law* (pp. 117-27), states: "The state treasury is not liable for debts of state enterprises. . . . On the other hand, those units are not liable for debts of the state treasury" (p. 120). This should be noticed by Western creditors, be they governments or private corporations. "Polish state enterprises and cooperatives may enter into contracts with foreign corporate bodies and individuals in order to establish joint enterprises." There is "a conscious effort to encourage foreign investment" (p. 121).

L. Garlicki, in *Polish Constitutional Development in 1980* (pp. 155-72), writes that in 1980 the Sejm vested the judicial branch with power to review the legality of administrative decisions. Exclusive jurisdiction in administrative cases is held by the High Administrative Court. The right to seek judicial review is vested in the party whose legal situation was affected by an administrative decision. The first step is to seek a modification of the decision by an appeal to the higher administrative authority. If this recourse does not result in the desirable change, appeal may be made to the High Administrative Court, which may set aside the decision as illegal. It then refers the case to the proper administrative agency, which is bound in its new decision by the court's interpretation of the law. If the

Government is dissatisfied, it may appeal the High Administrative Court's judgment to the Supreme Court, which has final jurisdiction.

W. W. KULSKI
Duke University

El Proceso de formación del derecho internacional de los archipiélagos. 2 vols.

By Carlos Bartolomé Jiménez Piernas. Madrid: Universidad Complutense de Madrid, 1982. Pp. I, 1217.

The author follows with an inquisitive eye and an analytical mind the genesis and development of the archipelagic concept and regime through state practice, international conferences, judicial decisions and the teaching of publicists from the 19th century to the last stages of the Third UN Conference on the Law of the Sea (1980).

The author focuses his attention on three main subjects: (1) the concept of archipelagoes, (2) the rules of delimitation and (3) the regime of the archipelagic waters.

In the first volume, Jiménez Piernas explains his method of research and examines the slow and often inconsistent emerging of the archipelagic institution up to 1960. In the second volume, he studies the archipelagic question at the Third UN Conference, explores the possible formation of customary international law on archipelagoes and presents a set of conclusions.

Putting formalism aside, Jiménez Piernas combines historical research with an analytical approach, and tries to detect the conflicting interests behind official positions and agreements. It would be difficult to find a meaningful event that has been overlooked. His careful examination and excellent utilization of primary and secondary sources give an impression of coherence, consistency and strength.

The development of the archipelagic institution has been characterized by two conflicting trends: (1) the consideration of the islands of archipelagoes as single and separate islands, and (2) the consideration of such islands as a geographical and economic unit. Jiménez Piernas examines both trends, together with the impact each has had upon the creation of law.

Before 1930, state practice regarding archipelagoes was disparaging and inconclusive. The *Fisheries* case included the first authoritative recognition of coastal archipelagoes as a unit. The treatment that this case receives here deserves meticulous study (vol. I, pp. 67-111).

The section dealing with the work of the International Law Commission on archipelagoes and the shifting positions of the special rapporteur is also of particular interest (vol. I, pp. 209-92). Jiménez Piernas rejects the commonly held view that the ILO barely paid attention to archipelagoes.

The 1958 Conference on the Law of the Sea partially adopted the dicta contained in the *Fisheries* case, but did not extend the new rules to oceanic archipelagoes. Jiménez Piernas puts forward the controversial assertion

that in eluding this question, the 1958 conference left it open to state practice.

The archipelagic institution really came of age during the preparatory work for the Third UN Conference on the Law of the Sea, with the arrival of independence for several archipelagoes and the implicit *quid pro quo* between developing archipelagic states and Latin American countries claiming an economic zone. The stage was set for negotiations in 1973: the Philippines, Indonesia, Fiji and Mauritius on one side, and the United Kingdom on the other side presented proposals on archipelagoes.

Jiménez Piernas states that the provisions of the Single Informal Negotiating Text (1975) concerning archipelagoes favored the maritime powers (vol. I, p. 33; vol. II, pp. 653-54 and 732-33). He attributes this outcome to the weakness of the archipelagic states and to the influence of the Latin American countries whose claims were primarily of an economic character (vol. II, pp. 659-60). Later, he concludes that the provisions worked out in the Convention on the Law of the Sea, which with slight modifications kept the provisions of the text mentioned above, balanced the interests of the parties concerned, except with respect to the regime of navigation (vol. II, pp. 116-17).

Jiménez Piernas thinks that the archipelagic waters of all archipelagoes should be declared interior waters (vol. II, pp. 957 and 991). An unmitigated power over the archipelagic waters would ensure the effective political and economic unity of the archipelago. Strict logic applied to the unity of archipelagoes might demand that waters and land be placed on the same footing. But in this as in many other cases, including judicial decisions, strict logic has to be tempered in order to accommodate the concrete facts of life and, among them, the conflicting interests that lie behind official positions and agreements.

Both at the 1958 conference and at the Third UN Conference, innocent passage—the regime of the territorial sea, not of interior waters—was preserved on waters enclosed within straight baselines not previously recognized under the regime of internal waters. There is really nothing new, then, in keeping innocent passage within archipelagic waters.

After long bargaining, some states that sat as a group of interests at the third session of the Third UN Conference (1975) proposed to the Chairman of the Second Commission a complete set of provisions on archipelagic states. The Chairman accepted the agreed text instead of exercising his own judgment on this part of the Single Informal Negotiating Text. This is the reason these provisions survived successive revisions of the text with slight amendments on the measurement of the baselines. This survival was an indication of the satisfaction of the parties or of an awareness that no better agreement could be obtained.

There were no records of the informal consultations at the Third UN Conference and the process of elaboration of the Single Informal Negotiating Text. Therefore, it is understandable that Jiménez Piernas does not refer to them.

Jiménez Piernas explores the possible formation of customary international law on archipelagoes. Distinguishing between the *archipelagic princi-*

ple—that is, the principle according to which archipelagoes are considered as a unit to be treated as such by international law—and *archipelagic rules*—the normative concretization of that principle—he concludes that the archipelagic principle has entered customary international law (vol. II, pp. 794–95). This conclusion seems consistent with state practice and with the agreements reached at international conferences.

He adopts the same conclusion with respect to delimitation and the economic regime of all kinds of archipelagoes. Nonetheless, navigation on archipelagic waters remains outside international custom. There are grounds to support the claim that the economic regime on the archipelagic waters of archipelagoes belonging to states but not constituting states by themselves is in the process of becoming part of customary international law. Regarding the length of the baselines for the delimitation of these archipelagoes, the practice still seems to be inconclusive. It may be that the provisions adopted in the Convention on the Law of the Sea, if applied by analogy to archipelagoes belonging to states, could develop into customary international law. It is doubtful that the international community would accept more liberal rules than those agreed upon in the Convention for archipelagic states.

In sum, the book by Jiménez Piernas must be commended to scholars, diplomats and politicians interested in archipelagoes in general, and in archipelagic states in particular. It is the most comprehensive study on archipelagoes published so far in Spanish. Certainly, as is to be expected in law, some of the conclusions of this book may be disputed and others accepted with certain reservations. This book makes a significant contribution to the law of the sea.

REYNALDO GALINDO POHL
International Ocean Institute, Malta

Lo Sfruttamento dei fondi marini internazionali. Edited by Tullio Treves.
Milan: Dott. A. Giuffrè Editore, 1982. Pp. xii, 195. L. 12.000.

La Convenzione delle Nazioni Unite sul diritto del mare del 10 dicembre 1982.
By Tullio Treves. Milan: Dott. A. Giuffrè Editore, 1983. Pp. xvii,
517. L. 28.000.

Following the lead of the United States, Italy was one of several Western nations at Montego Bay that chose not to sign the United Nations Convention on the Law of the Sea.¹ In *Lo Sfruttamento dei fondi marini internazionali*, a collection of essays on the exploitation of the international seabed, Treves gives a “first contribution of information and reflection” on the ensuing debate over Italy’s participation in the Convention and, in

¹ Other nations that did not sign the Convention include Belgium, the Federal Republic of Germany, Spain and the United Kingdom. Japan, although initially abstaining, recently signed. The Convention will enter into force 12 months after the deposit of 60 instruments of ratification. As of December 1984, only 14 countries had ratified.

particular, the "International Sea-Bed Authority." The work is composed of a selection of eight papers, two of which are in English, delivered in 1981 at a conference in Naples on the "New Law of the Sea and Italy."² As a critique of the Convention's mining regime, the volume is both timely and informative. It does not fully discuss, however, the other options facing Italy, such as unilateral development of the seabed based on domestic legislation or multilateral agreement to mine the seabed outside the purview of the UN Convention.

Treves states what could be called the central thesis of the book in his lead article on exploitation of the international seabed. Adopting what another Italian writer has termed "a synthesis between old and new positions,"³ Treves argues that until the UN Convention, and its "common heritage" principle, comes into force, exploitation of the international seabed should benefit mankind as a whole. But this does not preclude, in his view, unilateral action so long as the "benefit mankind" rule is respected. Unfortunately, Treves does not elaborate on what the "benefit mankind" requirement entails, or how it differs (if at all) from the "common heritage" principle. Moreover, his conclusion assumes that the International Sea-Bed Authority will eventually become the exclusive mechanism for mining the seabed beyond national jurisdiction (other measures being merely provisional). This assumption has proven overly optimistic since many of the nations possessing the technology to mine the deep seabed have subsequently refused to sign the Convention, primarily because of differences over the mining regime.

In addition to the lead article by Treves, the volume makes its biggest contribution by discussing economic and environmental aspects of deep seabed mining, two areas that have not received the same attention in recent writings as the legal and political issues. In *The Seabed Authority and the Organization of World Markets: Limitation of Production and Fiscal Power*,⁴ Empoli analyzes the impact of what he calls "consumer revenue" (the difference between the supply-and-demand curve for deep-sea ores) and the fiscal restraints imposed by the Convention. He concludes that, contrary to the principle that all of mankind should benefit, the international mining regime will be of economic benefit principally to the industrialized countries. Shifting the emphasis somewhat, Curtis and Barnes, in their

² The books under review constitute volumes 10 and 13 in the series *Studi e Documenti sul diritto internazionale del mare* (B. Conforti, V. Starace & T. Treves eds.). Other volumes in this series reviewed in this *Journal* include *La Giurisprudenza Italiana sul Diritto del Mare*, reviewed at 75 AJIL 1038 (1981); *Atlante dei Confini Sottomarini* (Atlas of the Seabed Boundaries), reviewed at 75 AJIL 199 (1981); and *Fondi Marini e Armi di Distruzione di Massa*, reviewed at 75 AJIL 1024 (1981), volumes 3, 5 and 8, respectively.

³ Conforti, *Notes on the Unilateral Exploitation of the Deep Seabed*, in [1978-1979] ITAL. Y.B. INT'L L. 3, 12. Conforti elaborates on the concept of the need to safeguard the interest of mankind in relation to the unilateral or cooperative exploitation of the seabed outside the framework of the Convention.

⁴ The Italian title is *L'Autorità dei Fondi Marini e l'Organizzazione dei Mercati Mondiali: Limitazione della Produzione e Potere d'Imposizione Fiscale*.

article on *Deep Sea Mining and the Environment*, express concern over the adverse environmental impact that scraping nodules from the seabed will have on the ocean bottom and in the water column above the mining activity. Given this threat, they push for a comprehensive regulatory structure, which, they argue, can only be effectively provided by the Law of the Sea Convention.

The text of the Draft Law of the Sea Convention relating to the "Area" (the seabed beyond national jurisdiction), i.e., the seabed mining provisions, is appended at the end of the book. As Treves points out, there were few substantive changes made between this portion of the Draft Convention and the final text, but one interested in studying the new law of the sea will obviously require the complete text as finally adopted. This, Treves provides in the other book under review, *La Convenzione delle Nazioni Unite sul diritto del mare del 10 Dicembre 1982*. Although copies of the Convention are readily available, this volume has the advantage of presenting the English and French texts side by side, as well as a brief but well-written introduction. It is interesting to note that, coming after the conclusion of the Law of the Sea Conference, Treves's introduction shows a much greater sensitivity than his earlier volume to the possibility that some nations may never participate in the Convention's mining regime and the issues that this would raise.

MARK M. LOOMIS

U.S. Army, Judge Advocate General's Corps

*Recueil des Cours de l'Académie de Droit International de La Haye, 1976. Vol. V. (Vol. 153 of the collection.) The Hague, Boston, London: Martinus Nijhoff Publishers, 1983. Pp. 410. \$41.50.**

One of the reasons for the unfortunate delay in publishing the last volume of lectures delivered at the Hague Academy of International Law in 1976 is implied by the first course, *Les Frontières Terrestres et la Relativité de Leur Tracé* by Daniel Bardonnet (Paris). Substantial parts of the text and many footnotes relate to documents and articles published as late as 1982. Professor Bardonnet's bibliography itself lists his own publications of 1981, 1982 (2) and 1983. There is no explanation given for the delay of 7 years between the time the course was given and the time of its publication. The other three courses published in this volume suffer from similar anomalies.

As to substance, the course by Bardonnet, specific in detail regarding some frontier disputes and skipping over others lightly,¹ takes a theoretical

* The review of the first four volumes of the 1976 *Course* was printed in 75 AJIL 684 (1981).

¹ For example, there seems to be little notice of the Sino-Indian dispute and the select bibliography has no reference to the basic works by Alastair Lamb (except for one general work of his misdated by 20 years in the bibliography), Neville Maxwell or the notes and articles in this *Journal* and in the *International & Comparative Law Quarterly* by this reviewer.

approach of substantial utility. Pointing out that many land boundaries have never been defined or agreed by the states concerned, Bardonnnet notes that the problem extends beyond the discontinuity of established boundaries to involve the entire conception of a boundary. There are many areas of the world populated hardly at all or by nomadic groups in which the notion of boundary is different but on which organized societies rely for their jurisdictional claims. The idea that jurisdiction is necessarily determined by territorial boundaries is not inevitable, even though that is the bias of European jurists. The requirements of what are frequently asserted to be the rules of international law, thus, do not always reflect practice. And armed clashes occur with some frequency over the overlapping claims of states, each side basing itself on transference to territorial terms of a jurisdiction historically exercised on other grounds, like ethnicity or membership in a religious order to which land boundaries are irrelevant. This valid insight is elaborated with much detail drawn from specific treaties, arbitration awards and cases, but the course tends to become descriptive only, and the conclusions, that boundaries would be regarded better as constantly subject to reconsideration as the facts change around them, and that obligations of states to submit their international disputes to peaceful settlement should replace the insistence on the eternal immutability of even agreed boundaries, seem correct but not fully supported by argument. Nonetheless, the finding of a mismatch between the usual firm assertions of law regarding boundaries and the actual facts on the basis of which more or less stable boundaries are accepted by states in practice, is a substantial contribution to diplomacy and legal scholarship.

The course by E. I. Nwogugu (University of Nigeria), *Legal Problems of Foreign Investments*, is a survey, expertly done, of what its title says. The first chapter points out some of the major problems that capital-importing states, whether industrialized or not, must have if, to attract foreign investment, they rely on legal incentives such as tax concessions and laws favorable to trade. These incentives must be balanced against other interests, such as retaining national control over the legal framework of the state's economy and the desire to assure opportunity for nationals of the capital-importing state to advance in a corporate structure operating within its territory (indigenization). Chapter II outlines the legal techniques that have evolved to protect foreign investment, including constitutional guarantees of private property (as in Nigeria and the United States), investment insurance and diplomatic protection and treaties. Chapters III through V deal with what happens when things actually go wrong, including various kinds of risk sharing, reparations arrangements, techniques for resolving investment disputes and unilateral sanctions for injury to investments like freezing of foreign assets, complaint to international organizations and less direct economic pressures.

Lawyers and others who cannot admit that there are two sides to many investment questions might have trouble with the emphasis given to the Charter of Economic Rights and Duties of States (pp. 206-07) as the basis for negotiation, but the presentation by Nwogugu seems adequately

balanced by the immediately following language pointing out that the legal status of the Charter has been a matter of debate and that it might be best regarded as containing elements which will contribute to the fashioning of useful rules. In general, this short course (about 80 pages) concisely summarizes the leading documents and cases, including the three Libyan arbitrations of 1977–1980, to produce a description of the current state of the law, with all its uncertainties, that should be of use to students and lawyers. It is an admirable chart through the shoals of foreign investment under international law, not too clear as to the strength of various tides, and not too helpful as to finding channels that would wind through any particular area, but marking the rocks with warning buoys.

Vincenzo Starace (Bari) lectured about *La Responsabilité Résultant de la Violation des Obligations à l'Égard de la Communauté Internationale*. His main thesis is that the text adopted by the International Law Commission in 1976 referring to "International Crimes and International Delicts"² correctly reflects state practice in according greater weight and enforcement pressures to some acts than to others, justifying a distinction between "crimes" and ordinary "delicts." To the argument that the enforcement measures provided in Articles 41 and 42 of the UN Charter in the case of an "act of aggression" also apply (under Article 39) to a mere "breach of the peace" or "threat to the peace" with no moral stigma necessarily implied, he responds by finding moral and legal evaluations implicit in the actual practice, which certainly shows that the Security Council action decided on would be directed *against* a state or other actor (like Southern Rhodesia, now Zimbabwe), and the decisions certainly were aimed at a breach or threat (pp. 294–96). He then argues that the extension of those special enforcement provisions beyond the armed threats to the peace to include apartheid seems already reflected in some actions of the Security Council; the further extensions proposed by the International Law Commission to cover the maintenance by force of "colonial domination" or "massive pollution" are simply progressive development of acceptable legal concepts. It is not clear to this reviewer that the words of Articles 39, 41 and 42 of the UN Charter can be stretched in this way without discrediting the entire enforcement structure. While it may be closer to reality to say that "threats to the peace" or "acts of aggression" are more easily perceived by the Security Council when the emotions aroused by "apartheid" are tapped, the primary result of this evolution might be a loss of confidence in the impartiality of the law; or has the Security Council become an organ for the enforcement of mere moral values?

The last course in the series for 1976 was given by Giuseppe Sperduti (Rome), *Le Principe de Souveraineté et le Problème des Rapports entre le Droit International et le Droit Interne*. It is a jurisprudential analysis of the place of international law, primarily treaty law, in the municipal legal systems

² The text he quotes appears verbatim in Art. 19 of the Draft Articles on State Responsibility Provisionally Adopted by the International Law Commission, UN Doc. A/32/183, dated Aug. 30, 1977, and in 16 ILM 1249, at 1254–55 (1977).

of states. Although dressed in the language of generality and beginning with some discussion of "monism" and "dualism" as legal models for the relationship of international law to municipal systems, primary emphasis is given to the municipal legal effects of the Treaty of Rome, and particular reference is made to various European (including the unwritten English) and American constitutional provisions referring municipal tribunals to the body of international law as grounds of decision. Sperduti seems to emphasize natural law theory, and identifies "the people" as the source of sovereign authority because that is specified in some constitutions. He seems to underplay possible conflict-of-laws approaches by which some municipal systems refer to international law to resolve some cases. And he does not try to analyze in any depth constitutions that make treaties an alternative lawmaking procedure on the same level as legislation through the internal organs of the state as well as, in common law countries, judicial decisions. Thus, the study builds an interesting model and might have some importance in understanding the logic of some members of the European Community or parties to some of the treaties proposed by the Council of Europe. It seems rather less comprehensive in its implication than might be supposed by its broad language and its references to legal and political theory reflected in some constitutions and judicial decisions, but not actually influential in lawmaking or in judicial decisions that, on closer analysis, might be seen to rest on less abstract bases.

ALFRED P. RUBIN

The Fletcher School of Law and Diplomacy

Recueil des Cours de l'Académie de Droit International de La Haye, 1980. 4 vols. (Vols. 166, 167, 168 and 169 of the collection.) Alphen aan den Rijn: Sijthoff & Noordhoff, 1981. Vol. I: pp. 448; vol. II: pp. 450. The Hague, Boston, London: Martinus Nijhoff Publishers. Vol. III, 1982: pp. 487; vol. IV, 1984: pp. 377.

The *General Course in Public International Law* in 1980 was given by Judge Manfred Lachs (International Court of Justice). Recognizing that it is impossible to deal adequately with both substance and theory in a single series of lectures, Lachs aims more for theory. For example, in his early discussion of the concept of the "state" as fundamental to an understanding of the international legal order, he concludes that that concept itself derives from the more fundamental political act of self-determination, which he seems to argue is a legal "right." His derivation of this "right" from natural law principles evidenced by history is replete with learned citations to the opinions of others, but its relationship to reality seems somewhat strained. Was Poland, for example, a "state" between the third partition (1795) and the reconstitution of 1918? And if so, are the Kurds of Iran and Iraq now a "state"? Without in any way disputing the importance of political factors, which must color a lawyer's interpretation

of the facts, and the importance of a sense of national cohesion as a political reality, the approach taken by Lachs seems to skip over the really important jurisprudential questions. He assumes the validity of the labels he prefers in the cases he discusses, and ignores awkward cases inconsistent with his general conclusions. The natural law emphasis leads further to exalt human rights as a legal principle, and to what seems historically and jurisprudentially a false parallel between the development of human rights and the process of decolonization (vol. IV, p. 61). An argument at least as powerful can be made that the perception of human rights as legally protected went step by step with the 19th century's perception of the moral value of free trade,¹ but there seems to be no consistent attempt at a balanced argument in this course.

This is not the place to respond to even a small selection of the many other assertions that seem ill-supported in theory or in fact, except to note that not all the footnotes tend to support the text. Nonetheless, the bibliography is excellent and the writing style clear and engaging. The *General Course* presents a point of view with eloquence and scholarship, and those who find its approach congenial will enjoy the course.

Hubert Thierry (University of Paris X-Nanterre) lectured on *Les Résolutions des Organes Internationaux dans la Jurisprudence de la Cour Internationale de Justice*. He begins by pointing out that there are a number of matters not dealing solely with internal subjects which under the Charter are to be definitively determined by resolutions of various organs of the United Nations, but that only two cases have been presented to the ICJ which directly required the Court to pass on the legal effects of General Assembly resolutions in the larger world: the Advisory Opinions in the *Expenses* case of 1962 and the *Namibia* case of 1971. The Court, Thierry concludes, is bound in such cases by three clear principles. It cannot refuse to render an advisory opinion properly requested; it must apply judicial principles to the resolution of legal questions; and it must not arrogate to itself the power of determining the disposition of a case submitted to it only for an advisory opinion. The rest of the course is a meticulous examination of the opinions of the Court, including dissenting and separate concurring opinions, with particular emphasis on the reasoning in the *Namibia* opinion. He concludes that the Court, torn between actively developing concepts of law as they might be applicable in the front-line cases on the one hand, and resting on conservative interpretations of the *lex lata* on the other, has tried to find a middle path. It has presumed the competence of the political organs of the United Nations to extend to the areas in which they have passed resolutions and then it has presumed the validity of those resolutions. But the Court has construed them to work as little change in the substance of the law as is consistent with a measured evolution of that law. It has normally construed resolutions to be mere non-law-creating

¹ For example, Sir Thomas Stamford Raffles, the "imperialist" who established Singapore as a British colony, abolished slavery there essentially because of his deep feelings about free trade. S. RAFFLES, *MEMOIR OF THE LIFE AND PUBLIC SERVICES OF SIR THOMAS STAMFORD RAFFLES* 46-47 and appendix, at 12 (1830).

recommendations. And when confronted with a need to go further, the Court has gone further slowly, with an eye to preserving its place as a judicial, not a political, organ of the international community.

The course *Théorie et Pratique des Négociations en Droit International* by Grigore Geamănu (Romanian Academy of Social and Political Sciences) delves deeply into the history of the practice of multilateral negotiation, differentiating so-called lawmaking from general peace settlements and other sorts of important negotiation, and concludes that the international practice is governed by some legal principles, such as good faith, but admits of ingenious variations. The attempt to classify these variations to some extent seems at times to illustrate the ingenuity of statesmen more than the power of legal precedent. The principles listed at the end as capable of being taken into consideration by Romanian diplomats in their negotiating efforts are principles that all would agree with, such as the importance of peaceful, as distinct from forcible, settlements, and the primary responsibility of the states actually involved in a dispute to settle it, with only secondary and tertiary responsibility for the neighbors and others which, by their position, can help promote a solution, and at the same time mistrust in solutions imposed from outside. The course thus provokes thought about such serious questions of legal theory as whether there is a rule of "standing" implicit in the international legal order that renders futile attempts by outsiders to resolve international problems even by treaty without also committing themselves to direct involvement. But those thoughts are not developed in the course itself.

Marco G. Marcoff (University of Fribourg) delivered a course, *Sources du Droit International de l'Espace*, discussing in depth many jurisprudential questions surrounding the formation of new rules of law attuned to the interactions and challenges of an environment, space, to which the preexisting rules are not self-evidently applicable. An introduction sets out the notion that even treaties must reflect conceptions as to the legal relationships of states; that not all terms of even a comprehensive treaty are "law-making" in a vacuum. Marcoff next briefly summarizes the field of operation of general treaties, such as the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies and the 1972 Convention on the International Liability for Damage Caused by Space Objects; relevant general treaties not exclusively concerned with space law, such as the Nuclear Test Ban Treaty of 1963; and multilateral and bilateral treaties dealing with particular problems integral to space activities such as the series of conventions and regulations promulgated through the International Telecommunication Union concerning satellite communications.

Marcoff then introduces the concept of lawmaking by custom and the difficulties of proving the existence of an *opinio juris sive necessitatis* to underlie a practice asserted to be evidence of the law. In particular, he discusses the arguments raised by the equatorial states of Brazil, Colombia, the Congo, Ecuador, Indonesia, Kenya, Uganda and Zaire in the Bogotá Declaration of December 3, 1976, claiming that the positioning of geostaz-

tionary satellites above their land territory without their permission deprived them of natural resources that by law were part of their territory. Those arguments were rejected by the states participating in INTELSAT on the basis that space is part of the commons available to all on an equal basis. Since the height of the geosynchronous satellites is far beyond any rational upper limit to airspace, Marcoff seems to side with the INTELSAT position, but admits to some doubts, particularly as military implications and the possible stationing of solar energy collectors in the disputed areas might change people's perceptions of the rules involved and the legal values that lie behind the rules.

Turning to the assertions of individual states, unilateral acts, legislation, etc., Marcoff finds that those acts have legal meaning but not necessarily as part of a legislative process; some might even be violations of existing international law, or have their primary effects in municipal politics. Similarly, the resolutions of international organizations might have effects within the special context of the organization, but the impact of those resolutions on general international law outside of that institutional context must be small.

A final section ties all this together with an overview of the dynamic lawmaking processes of public international law. The course is a masterful analysis through the particulars of space activities of that lawmaking process and can be read for its jurisprudential insights at least as much as for its outline of the evolution of the positive law of space activities.

Georges Ténékidès (European Human Rights Commission) delivered a course tracing *L'Action des Nations Unies contre la Discrimination Raciale*. Although it begins with a short and literate study of the sociology of racism, from Gobineau through Hitler and Rosenberg to Camus and Sartre, and the history from Greek theories of "natural" slaves through modern anti-Semitism seems to skim a thick scum off a deep pool, there appears to be very little law involved; there appears to be no mention, for example, of the popular "scholarship" of Lorimer whose racial bases for colonialism were very influential in the heyday of late 19th-century European expansion. The greater part of the course is a detailed study of the various UN actions, including committee actions, General Assembly resolutions and UNESCO efforts addressed to "racism." It makes the notable, but hardly surprising, observation that when a self-determination struggle that is political at base is made to seem a struggle against "racism" in a single state whose acts in context do not seem more pernicious than the acts of many others that might be regarded as "racism," the use of two standards, the loss of generality in the assertions of "law," undercuts the utility of law in the entire international community and does not really help with regard to either racism or the self-determination struggle. The discussion is a comment on the activities of the Committee for the Exercise of the Inalienable Rights of the Palestinian People, and Resolution 3376 (XXX), dated November 10, 1975, of the General Assembly (vol. III, pp. 344-46). Oddly, there seems to be no mention in this section of Resolution 3379 of that date, equating "zionism" with "racism."

In sum, Ténékidès has written an eloquent, at times moving, summary and analysis of the actions of the United Nations with regard to "racism," but there seems to be an insularity implicit in his approach that makes it more a study of the weaknesses of a single institution than an incisive study of international law as it might apply to racist acts by governments, institutions or individuals. Within its own bounds, it is a substantial contribution to the study of the limits of an international organization as a lawmaking and law-reflecting body.

For those wanting a concise summary of the activities of states in international satellite communication, the course by Nicholas M. Matte (Institute of Air and Space Law, Montreal), *Aerospace Law: Telecommunications Satellites*, runs down the international organizations and their activities as of 1980. There is both an elegantly phrased survey of the organization and voting arrangements of INTELSAT (only those who have read the constitutional documents can understand how difficult this summary must have been to write) and a summary of other organizations and some national efforts to use space in international telecommunications. Two issues are isolated as current legal problems: the prevention of unauthorized distribution of program-carrying signals transmitted by satellite; and the transfer of telecommunications satellite technology to developing states. Dr. Matte seems to believe that national property law in copyrighted information reflects some natural property law concepts that will encourage the conclusion of a treaty to safeguard copyrighted productions adequately in third countries, and that provisions for the participation of developing states in the international organizations sponsoring telecommunications satellites are adequate to satisfy their demands for the new technology. In the absence of further argument, it is possible to remain skeptical on both scores.

One course lies in the area of most active confrontation between private and public international law, *The Law of Sovereign Immunity: Recent Developments*, by Sir Ian Sinclair (Foreign Office, London). In addition to tracing the 19th-century evolution of the doctrine of sovereign immunity and the various efforts at codification, the post-1945 case law and legislation are analyzed in masterful detail. His proposition (vol. I, p. 214) that none of the usually stated reasons underlying the restrictive theory affords a fully satisfactory intellectual justification for it is one rarely heard in the United States, but is undoubtedly correct. The author has not considered alternatives such as the possibility that a state engaging in commercial activities impliedly consents to the application of the normal commercial law in the places in which those activities occur, an approach identical in form to Marshall's reasoning in the *Schooner Exchange* case, where an implied consent to withhold the application of all local law was derived from a permission granted by the host state to receive a foreign public vessel. But this review is not the place to engage in argumentation. A section on immunity from execution finds the case law of many countries continuing to support the rule favoring such immunity established in the *Duff Development Company* case for Anglo-American jurists. A final section compares the terms of the American Act of 1976 with the United

Kingdom's State Immunity Act of 1978, generally finding the British Act to be drafted in clearer and more forthright language. This course is an excellent introduction to the current state of the law.

The course by Arthur von Mehren (Harvard Law School), *Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements*, complements well Sinclair's course on the law of sovereign immunity but seems focused on private international law questions and theories of post-adjudication municipal law enforcement of foreign judgments, so lies beyond the range of this review.

Another course lying on the boundary between public and private international law is *Status and Independence of the International Civil Servant*, by Theodor Meron (New York University School of Law). This analysis is particularly timely in pointing out the increasing assault by some states on the independence of international civil servants. Meron makes the excellent point (vol. II, pp. 336–37) that the failure by all states members of the United Nations to refer to the ICJ for a "decisive" ruling under Article 30 of the Convention on Privileges and Immunities of the United Nations on such apparent violations of the agreements on the status of UN employees as the imprisonment in Poland of Alicia Wesolowska in 1980 undercuts the integrity of the entire system. As a whole, the course is a clear summary of the law and practice and a fine introduction to the topic for students of international organization law.

Three other courses seem to lie primarily in the private international law field and are mentioned here to complete this summary of the contents of the volumes under review. G. A. L. Droz, M. L. Pelichet and A. Dyer (Hague Conference on Private International Law) joined together three short essays on the achievements and prospects of the Hague Conference on Private International Law 25 years after the founding of its permanent bureau; Peter M. North (Law Commissioner for England and Wales) lectured on the *Development of Rules of Private International Law in the Field of Family Law*; and Sergio M. Carbone (University of Genoa) lectured on *La Réglementation du Transport et du Trafic Maritime dans le Développement de la Pratique Internationale*.

ALFRED P. RUBIN

The Fletcher School of Law and Diplomacy

Anuario Argentino de derecho internacional. Vol. I, 1983. Córdoba: Asociación Argentina de Derecho Internacional, 1983. Pp. 386.

During the military dictatorship in Argentina, international law writings were scattered, uninteresting and hopelessly flat, as was almost all intellectual production. It would be an interesting task for the sociologists of international law to investigate the causal relationships between political oppression and international legal scholarship. Absent such inquiry, however, the present reviewer can only convey impressions, gained from his own experience, as to the possible reasons for such a decay in a country that once was the intellectual leader of Latin America.

From the beginning, three foreign policy issues dominated the junta's governmental action: the Beagle Channel dispute with Chile—which Jorge

Luis Borges once appropriately called "the imaginary war"—the Malvinas conflict with Britain and human rights. During the junta period, most of the Government's diplomatic and nondiplomatic efforts were concentrated on those issues. The junta's hawkish attitude toward the Malvinas and Beagle territorial disputes was a way of attempting to prove their patriotism in the face of criticisms directed against their laissez-faire economic policies, which were perceived by many as contrary to the national interest. The human rights issue arose instead, despite the will of the junta. This issue was prompted by the vigorous and effective criticism by human rights groups and democratic governments, most notably President Carter's, against the atrocities committed by the military Government.

So strong were the junta's feelings on the Malvinas, Beagle and human rights issues that it was dangerous to publish critically about those topics. Some articles were published about the Malvinas and Beagle disputes, but they were hardly more than apologetic pieces of heated nationalism, written with the aim of supporting the aggressive policies of the junta. This reviewer does not recall having read a single article during those years criticizing the incredible series of threats proffered by the Argentine Government against Chile in 1978 (which clearly amounted to a violation of Article 2(4) of the UN Charter), or having read or heard a single voice of public condemnation of the illegal and senseless invasion of the Malvinas. Nobody even suggested, for example, that Argentina should submit the ill-fated Anglo-Argentine dispute to the International Court of Justice—which, quite apart from reasons of principle, would have been a wise political move, in view of the strong legal case Argentina can make and of the impossibility of settling the controversy by bilateral negotiations.

This restraint on the part of the Argentine legal community on territorial issues was also conspicuous with regard to the junta's human rights violations. Talking, much less writing, about human rights was forbidden—in the subtle and terrorizing form of veiled threats and consequent self-censorship—for all those who lived in Argentina and cared about their personal safety (including this reviewer). The fate of many journalists who dared to write against the Government was a grim reminder for academicians of the ominous, ever-present threat. One has to understand, then, the difficult conditions under which academic life took place. One has to understand that an unprecedented economic crisis, a humiliating military defeat and the increasing public awareness of the crimes committed by the junta had placed Argentina, by June of 1982, on the verge of moral disintegration.

I would like to put forward two general propositions regarding the effect on legal writing of situations like the one just described, and which are illustrated by the yearbook under review. First, scholars avoid publishing on topics about which dictators may be sensitive. Second, as a general trend, oppression produces a chilling effect upon the quality of scholarship, even where the topics are less politically charged. This correlation between freedom and scholarly quality occurs because oppression weakens intellectual motivation, even among those who are supporters of the rulers or are indifferent to the political climate.

Written in 1981, the 1983 *Anuario Argentino de Derecho Internacional* is an illustration of both propositions. The book is a collection of articles divided into two parts: the first consists of the presentations made at the *Segundas Jornadas Rioplatenses de Derecho Internacional* (Second International Law Meeting in the Rio de la Plata); the second, of the contributions to the *Sexto Congreso Ordinario de la Asociación Argentina de Derecho Internacional* (Sixth Congress of the Argentine International Law Association). Significantly, none of the articles touches upon any of the pressing international problems described above.

The first part of the book begins with three articles on the legal nature of the exclusive economic zone (EEZ), by J. C. Lupinacci, C. A. Armas Barea and F. M. Pfrter de Armas, and L. del Castillo. Each concludes that the EEZ cannot be legally subsumed under either the high seas or the territorial sea, and is therefore a *sui generis* maritime zone. Although the discussions about the "legal nature" of the EEZ are pseudo-debates about words, the articles provide some insights, in particular the one by J. Lupinacci, who points out that the principles of sovereignty and of freedom of the seas coexist in the EEZ's legal regime as a function of different purposes for which the EEZ was created. The first part ends with a brief proposal of Argentino-Uruguayan integration by Z. D. Clement and G. R. Salas.

The second and longer part offers works of uneven value. The first article by M. A. Vieira contributes an interesting analysis of the EEZ from the viewpoint of conflicts of law. The author concludes that with regard to admiralty cases, the rules of conflict of that discipline will control; with regard to other cases, the rules of conflict of the coastal state shall apply. In perhaps the best article of the book, M. T. Moya Domínguez offers an excellent comparative analysis of the Latin American integration treaty, ALADI, and its predecessor, ALALC. The author is skeptical about the potential of ALADI to foster real Latin American integration.

The next article, by G. Martí, deals with the notion of conflict in international relations. The author attempts to summarize the causes of conflict along "realistic" lines. She contends that collective security and the attempts to define aggression are the result of "romantic idealism" and "contrary to human nature" (p. 158), adding that all the discourse about security, i.e., self-defense, aggression, just war, is subjective. In pointing out the ideological division as one of the causes of international conflict, Martí suggests that the rapprochement of the two blocs can only come about through a common philosophical motivation. On the whole, the piece is disappointing: like those of her realist predecessors, Martí's arguments against the effectiveness of international law overlook the specific ways in which international law works, and her relativist and subjectivist assumptions remain to be proven.

The piece by M. Williams analyzes the international maritime satellite system, INMARSAT. Although the article does not have the academic quality of Professor Williams's previous works, it is nevertheless a useful exercise, because it provides a rare updating of space law in Spanish legal literature. The next article, by E. Hooft, is an exhaustive and well-

researched, albeit unsophisticated, report on the problems faced by the Argentine fishing industry from a legal perspective. Aware of the danger posed to the species by indiscriminate foreign fishing activities carried out just outside Argentina's EEZ, the author recommends that Argentina should conclude fishing agreements with those states (mainly West Germany, the USSR, Japan and Poland). Although there are some errors (for example, at p. 204 the author mistakenly states that in 1974 the International Court of Justice validated Iceland's unilateral fishery limits), the article is informative and contains coherent and clear recommendations.

Finally, A. Sève de Gaston contributes an article on unilateral acts and their bearing on Argentine maritime interests. The author introduces a complicated theoretical apparatus before concluding that unilateral acts by states declaring exclusive economic zones have created a customary norm. The article promises more than it delivers; it contains, however, a useful appendix of such unilateral acts.

Argentina has not had an international law yearbook for many years (with the exception of the yearbook published by the International Law Institute of the University of Buenos Aires in 1981). The *Anuario* under review, for the reasons outlined above, lacks intellectual audacity—more for what it omits than for what it contains—and, with some exceptions, it is not up to the outstanding pre-1970s' standards of Argentine legal scholarship. Yet the collection should be welcome as the timid beginning of the renaissance of international legal writing in Argentina, and as a rare attempt to keep alive the fine Argentine intellectual tradition amidst official intimidation. Times have changed much for the better now, and democracy and its by-product, the free market of ideas, will, one hopes, do the rest.

FERNANDO R. TESÓN
Arizona State University

IV Jornadas de Profesores de Derecho Internacional y Relaciones Internacionales (4, 5 y 6 de julio de 1979). Granada: Universidad de Granada, 1980. Pp. 271. Index.

Anuario de Derecho Internacional. Vol. IV, 1977–1978. Edited by José A. Corriente Córdoba, with Enrique Rubio Torrano and Pedro Lozano Bartolozzi. Pamplona: Ediciones Universidad de Navarra, S.A., 1981. Pp. xii, 683.

El Derecho Internacional en los Congresos Ordinarios. Asociación Argentina de Derecho Internacional. Córdoba, 1981. Pp. 362.

Anuario Mexicano de Relaciones Internacionales, 1980. Mexico: Universidad Nacional Autónoma de México, 1981. Pp. 1087. Indexes.

Derecho y Política en el Espacio Cósmico. By Modesto Seara Vázquez. Mexico: Universidad Nacional Autónoma de México, 1981. Pp. 171.

In the past decade, scholars in the Spanish-speaking world have increasingly contributed to an understanding of international law and politics

that will become more appreciated in the future. One example is the positive response by those in the legal and intellectual communities to the principle of human rights. The collection of 15 papers in the *IV Jornadas de Profesores de Derecho Internacional y Relaciones Internacionales* (July 4-6, 1979), all presented by Spanish scholars, addresses the various aspects of the principle of human rights and its application to international politics.

Antonio Truyoly Sera presents a general historical review of human rights from the era of the Reformation. He briefly describes events and statements that have had some significance for the development of human rights. Augustias Moreno López then elaborates on the meaning of human rights in our present era, emphasizing that the phrase "human rights of solidarity" might generate aspirations like those raised by such phrases of the recent past as "new generation" and "new frontier." The main issues associated with this contemporary view of human rights consist of those rights derived from scientific and technological advancements, rights to universal peace, rights to individual personal self-development and rights of racial or national self-determination. Obviously, some of these issues are highly contentious in nature, but these will be the general issues that advocates of human rights will continue to address. The rest of the essays in this volume discuss several different aspects of human rights, ranging from theoretical questions (the application of the concept "limited sovereignty" to human rights) to specific issues (children's rights, sex discrimination, the effect of multinational enterprises on human rights in South Africa).

The contribution of Spanish scholars should also increasingly attract our attention as attempts are made to articulate and develop modern concepts of international law. One example is the publication of the *Anuario de Derecho Internacional*. Volume IV (1977-1978) contains an introductory article, written in French, by Marc Schreiber on the 30th anniversary of the Declaration of the Rights of Man (December 10, 1948). José Juste Ruíz discusses the influence of prevalent perspectives and concepts of international law on the formation of the Spanish Constitution of 1978. In addition, this journal provides an extensive list of all legislation passed by the Spanish Government pertaining to every aspect of private and public international law, as well as the full texts of relevant documents.

The Argentine Association of International Law is the publisher of *El Derecho Internacional en los Congresos Ordinarios*. The 1981 volume includes papers and resolutions of the fourth and fifth congress meetings of the association (1977 and 1978). The emphasis of these papers is on particular questions facing Argentina, its relations with the rest of South America and issues unique to Argentina. For example, Alfredo Bruno Bologna presents an examination of some of the political dimensions of resource exploration in the Antarctic. Several papers of particular interest in Central and South American politics, such as the role of multinational enterprises, inter-American relations and resource exploitation, are also included. Those interested in the "law of the sea" might consider reading the paper by Ernesto J. Rey Caro which outlines Argentina's definition of maritime sovereignty. However, no mention is made in this volume of the

Falkland Islands-Islas Malvinas dispute, a central political issue concerning Argentina. Also, I would like to mention the topics of two papers presented by Aldo Armando Cocca for this volume involving international space law, a subject briefly discussed later in this review. His papers examine (1) the complex problems involved with the utilization of energy (especially solar energy) from outer space, and (2) the impact of space exploration on the nature of human societies in the future. On the latter point, it might be added that human societies are emerging into a new era of anxiety and vulnerability due to the way in which we explore space.

The *Anuario Mexicano de Relaciones Internacionales*, 1980, the first volume in the series, contains 23 excellent contributions on various contemporary issues. Celestino del Arenal, in the introductory essay, contends that international law and international relations are scientific disciplines providing the essential basis for comprehending the nature of international politics. This is followed by Héctor Cuadra's analysis on the general relationship between international relations and the social sciences. Other essays examine the role of international sports competitions in international politics, with a comment on some of the controversies surrounding the 1980 summer Olympic games (Michael J. Flack); artists' rights in contemporary international law (Víctor Carlos García Moreno); the Treaty of Tlatelolco and its development, with emphasis given to the nuclear arms issue (Alfonso García Robles); "custom" in international law (Antonio Gómez Robledo); the origins of World Wars I and II (Alonso Gómez-Robledo Verduzco); the use of force and armed struggle in the quest for "liberation" (José-Agustín González Fernández); the Ixtoc-I mine disaster and international responsibility (Héctor Gros Espiell); foreign capital, the international "division of labour" and national development questions in Central and South America (Marcos Kaplan); the regulation of space law (Alejandra Martínez Cranss); the necessity for an international strategy of development (Alfonso T. Muñoz de Cote Otero); the demography of Mexico's coastal region (Bibiano F. Osorio-Tafall); the attempts to achieve various levels of integration among the Caribbean states (Gerard Pierre-Charles); juridical aspects of international terrorism (Juan Manuel Portilla Gómez); the UN convention on transport (José Eusebio Salgado y Salgado); Marxism and international relations (Julio Sau Aguayo); Mexican contributions to international law and organization (César Sepúlveda); the concept of "graduation" or stages of national development in the international economy (Claudio F. Urencio C.); the continental shelf (Jorge A. Vargas); the *Clipperton Island* case and Mexican jurisdiction (David Vega Vera); and the United Nations and the task of disarmament (G. Zhukov). One particular essay to note is a summation of "humanity in crisis" by Modesto Seara Vázquez, director of the *Anuario*. In an ever-shrinking world with a growing population approaching five billion, three major challenges need to be addressed: the ecological crisis, the economic crisis, and the political and ideological crises.

This volume also contains a detailed outline of Mexican external relations and foreign policy, including a list of treaties, conventions and documents significant in international affairs during the past year, and an

exhaustive summary of the external relations of all nation-states and the activities of major international organizations. There are extensive reviews of major publications in Spanish as well. In sum, this journal constitutes an excellent source of material from Mexico and other Spanish-speaking countries which, together with the impressive essays, makes it a major contribution to international law and politics.

Finally, in the past two decades, international law has evolved to take into account the tremendous technological achievements in the research and exploration of outer space. But as the conquest of outer space, led and dominated by the United States and the Soviet Union, takes on important and profound political and military dimensions, the need for international space law will become more essential.

According to Modesto Seara Vázquez, in his book *Derecho y Política en el Espacio Cósmico*, the application of international law to space exploration needs urgent attention, especially because of the need to regulate current activities in space. As space exploration becomes more complex, its consequences will be even more profound requiring a new conception of international law that can address some of these emerging problems. Seara Vázquez believes that such a new conception is now possible and can be based on "current typical activities" in space exploration. From these activities, first principles of law can be formed, which will provide the foundation for a comprehensive and systematic set of laws. Once this systematic whole of principles becomes established as custom, occasional modification can be made when it is considered necessary.

At the present, we must attempt to acknowledge and encourage the development of several delimited areas of international law that will aid our ability to confront emerging complex issues in the future. Examples advanced here are astronomical law, interplanetary law, ultra-atmospheric law and international space law. This book is a good short summary in Spanish of space exploration and international law. Chapter II describes the major agreements stemming from conventional regulations and the Treaty on Outer Space of 1967. Chapter III summarizes some of the current issues and chapters IV and V include a compilation of materials on the bilateral agreement between the United States and the Soviet Union of 1977 and all relevant UN resolutions for the years 1958-1977. This book also includes an extensive list of citations from sources published in various languages, and a short bibliography.

ALLAN E. WARNKE
University of British Columbia

Digest of United States Practice in International Law, 1979. By Marian Lloyd Nash. Dept. of State Pub. 9374. Washington: U.S. Govt. Printing Office, 1983. Pp. xxii, 1933. Index. \$22.

The publication of a new volume of the *Digest of United States Practice in International Law* constitutes an important literary event in that legal

discipline because of the massive infusion of new factual information. The seventh annual volume spans the third year of the Carter administration and includes a vast amount and variety of materials reflecting the actions of and reactions by the three branches of the U.S. Government in the conduct of foreign relations.

The previous volume, which was reviewed in the April 1982 issue of the *Journal*,¹ raised high expectations for its successors. They are fully met. The Department of State deserves the gratitude of the far-flung readership of the *Digest* for having entrusted the preparation of the work to the full-time efforts of such an experienced and qualified officer as Mrs. Harold Herbert Leich.

The most important of the events that are mirrored in the volume are highlighted in the skillful and perceptive introduction by the Department's Legal Adviser who undertook this task although the period covered fell under the responsibility of his two predecessors in office.

The new volume of the *Digest* follows the topical arrangement of its predecessors, distributing the included materials over 15 chapters, divided into subsections. The volume includes documents of diversified character and authoritativeness, such as treaty negotiations and other diplomatic correspondence, including exchange of notes and aide-mémoires, presidential reports, submissions of treaties for advice and consent, testimony of State Department officials before congressional committees, exchange of interagency memorandums, statements of U.S. representatives in proceedings of international organizations, press releases by the White House or high-ranking Department officers, judicial decisions, amicus briefs or statements of interest in judicial proceedings and orders of administrative tribunals or government agencies. In fact, the scope of the *Digest* is so broad and diversified that it would be advisable to make it clear that inclusion in the *Digest* does not imply an official endorsement of its contents, so as to avoid any claims of acquiescence or estoppel.

The year 1979 witnessed on the one hand unparalleled disturbances of international peace and order, such as the seizure of the hostages in Iran and the invasion of Afghanistan, and on the other hand progress in the settlement of disputes in other trouble spots, such as the conclusion of the Egyptian-Israeli Peace Treaty, the signature of an Agreement between the People's Republic of China and the United States Concerning Settlement of Claims and the establishment of a new legal framework for the relations with the people of Taiwan. In that year the U.S. Government also reaffirmed its commitment to the international protection of human rights (both on the part of the Executive as well as of the judiciary) and maintained its efforts to bring the law of the sea negotiations to an acceptable conclusion.

The events and endeavors mentioned in the foregoing paragraph prompted intense activities of Congress as well as of the Executive. In

¹ 76 AJIL 437 (1982).

addition, the judiciary was confronted with a vast amount of cases involving questions of foreign relations, especially those prompted by the restructuring of the relations with the People's Republic of China and the people of Taiwan and by the U.S. actions in response to the events in Iran.

The *Digest* constitutes a comprehensive and illuminating chronicle of the manifold actions and responses of the U.S. Government precipitated by a troubled and troublesome world. The editor obviously has labored hard and diligently to produce a comprehensive as well as informative and well-organized tome. Because of the increasing bulk of the *Digest*, however, it might be helpful to eliminate the reproduction of well-known and easily accessible international documents, such as Security Council Resolution S/242 of 1967 (p. 15).

The usability of the *Digest* is greatly enhanced by an index covering 33 pages and a table of cases filling 14 pages.

STEFAN A. RIESENFELD
Board of Editors

Control of Foreign Policy in Western Democracies: A Comparative Study of Parliamentary Foreign Affairs Committees. Volume I: Parliamentary Foreign Affairs Committees—The National Setting. Edited by Antonio Cassese. Pp. 381. *Volume II: The Transnational Setting: The European Parliament and its Foreign Affairs Committees.* By Joseph H. H. Weiler. Pp. 161. *Volume III: The Impact of Foreign Affairs Committees on Foreign Policy.* Edited by Antonio Cassese. Pp. 142. Padua: CEDAM, 1982. Copublished with Oceana Publications, Inc. \$60/set.

There is one basic principle on which most students of international relations agree: in the interdependent world we live in the distinction between foreign and domestic policies is becoming less and less pronounced with each passing decade. This would suggest that more attention must be paid to the changing role of parliamentary bodies in the formulation and conduct of foreign policy.

That is what these three volumes are all about. They represent the findings of a long-term research project sponsored by the Italian National Research Council for the purpose of examining the activities of foreign affairs committees (FAC) as they function in parliamentary democracies and in the European Communities, as well as the executive-legislative relationships.

What has happened in the United States is obvious. Ever since the Vietnam War, Congress has played a more assertive role in foreign policy, imposing a good many restrictions and limitations on executive action. Indeed, we have reached a point in executive-legislative relations where some writers suggest that we now have "foreign policy by statute."

Quite another trend is taking place in other parliamentary democracies. In most Western European countries parliamentary control over the executive in foreign affairs has not kept pace with comparable control



over domestic affairs. This is partly due to the transfer of certain authority to the European Communities—particularly in the economics field—which has resulted in a net loss of national parliamentary control in favor of the executive.

In volume I of this series the editor and his battery of 17 specialists examine the role of the foreign affairs committees in Belgium, the United Kingdom, France, Italy, West Germany, Denmark, the Netherlands, Spain, Israel, Canada, Japan and the United States. Each author, in his own way, explores such issues as (1) the relationship of the foreign affairs committee to the parliament and the extent to which the FAC performs useful functions; (2) the membership of the FAC and the qualifications necessary for membership; (3) the committee's relations with the executive and the extent to which the committee can be said to influence policy; (4) the relationship of the committee to public opinion—the press, political parties and pressure groups; (5) the committee's role in treaty making; and (6) the sources of information available to the committee.

As one would expect, with 17 writers, the result is a mixed bag. Most of the essays are good; some are routine. Together they form a mine of helpful information about the role of foreign affairs committees in the foreign policy process.

The principal lesson one learns stems from the fact that the House Foreign Affairs Committee and the Senate Foreign Relations Committee play a much more exalted role than the FACs of the other countries surveyed. For the most part, their staffs are very small by comparison, their outside sources of information are quite limited and they have much less power than their American counterparts.

The editor of the series concludes that there was "general agreement that national parliaments as well as the European Parliaments need to have a stronger voice in the making of foreign policy; and that this would not detract from the efficiency of the Executive, but would on the contrary be of service to governments too."

In volume II (written by Joseph H. H. Weiler), the writer points out that the existence of the European Communities—especially the EEC—has greatly complicated the problem of establishing parliamentary control over foreign policy. This is due in part to the natural competition that one might expect between the European Parliament, on the one hand, and the legislative bodies of the nation-states on the other, but also to the fairly wide range of foreign policy problems over which the Community has competence—at times exclusive competence. Professor Weiler takes a good hard look at these problems with particular reference to the role of the European Parliament and its committees—with all their weaknesses—in promoting a greater degree of parliamentary control over foreign policy.

The third volume in the triad is a "summing up" volume which contains the proceedings of an international conference held in 1981, to evaluate the findings of the research project set forth in volumes I and II. The conference had three main objectives: (1) to enable the authors to discuss their reports with civil servants and parliamentarians; (2) to consider from

a general point of view the specific problems that arise in connection with individual countries; and (3) to make practical suggestions as to steps that might be taken to make the foreign affairs committees more effective.

This latter point received considerable emphasis during the conference because, as one participant explained: "Power has disappeared from the national parliaments, to some extent, without being relocated anywhere else." This certainly has not happened in the United States but it has happened in the countries of Western Europe.

This is the nub of the problem. The fact is that democratization of foreign policy is taking place with increased emphasis on public accountability. Moreover, the general level of education in the Western countries has improved considerably, with the result that there is a greater demand for parliamentary action. Even more important, many developments in the international field have a direct bearing on unemployment, inflation, wages and prices, so it is only natural that both the public and the professional politicians want a greater control over foreign policy.

As usual, the diagnosis of the ills is easier than advancing constructive suggestions for the future. The participants do put forth a number of suggestions, however, including more and better information, greater publicity for parliamentary debates, sensitizing the public to foreign policy issues, more adequate staff support and more satisfactory debating time for FAC members. While they recommend that the role of parliaments and FACs should be strengthened, they make clear that these instrumentalities should not "substitute themselves" for the executive branch. Control of foreign policy, in other words, should be *a posteriori*; it should come *after* the event and not before.

FRANCIS O. WILCOX

The Atlantic Council of the United States

Chinese Yearbook of International Law and Affairs. Vol. 2 (1982). Edited by Hungdah Chiu. Taipei: Chinese Society of International Law—Chinese (Taiwan) Branch of the International Law Association, 1983. Distributed by the Occasional Papers/Reprints Series in Contemporary Asian Studies, Inc. Pp. 432. Index. \$10.

This second volume generally follows the format established by its predecessor. The Articles section contains four articles that deal with the Tiao-yu-t'ai Islands (Senkaku Gunto in Japanese) dispute, relevant issues in U.S. arms sales to Taiwan and the introduction of international law into China and its implications for reform in late Ch'ing China.

East China's maritime boundary delimitation remains a perplexing issue, especially for the several major Western oil companies now exploring there. K. T. Chao's *East China Sea: Boundary Problems Relating to the Tiao-yu-t'ai Islands* (pp. 45–97) enumerates the historical and legal claims to the islands asserted by both China and Japan. Ying-jeou Ma's *The East Asian Seabed Controversy Revisited: Relevance (Or Irrelevance) of the Tiao-yu-t'ai (Senkaku) Islands Territorial Dispute* (pp. 1–44) deals primarily with the

relevance of the islands in delimitation of the maritime boundary there, with special reference to the application of relevant provisions of the 1982 UN Convention on the Law of the Sea and the *Tunisian-Libyan Continental Shelf* case decided by the International Court of Justice in 1982.

A major diplomatic crisis between the United States and the People's Republic of China in 1982 concerned arms sales to Taiwan. Arms sales are, of course, of vital importance to the Republic of China on Taiwan. Lyu-shun Shen analyzes this issue in *The Washington-Peking Controversy over Arms Sales to Taiwan: Diplomacy of Ambiguity and Escalation* (pp. 98-120). Shen's article should be read in connection with Hungdah Chiu's *Selected Documents Concerning United States Arms Sales to Taiwan* (pp. 192-227) in the Current Developments section. This piece collects and annotates all relevant documents relating to arms sales, including an interpretation of the August 17, 1982 U.S.-PRC Joint Communiqué by President Reagan and the Department of State, discrepancies between the Chinese and English texts and the ROC's response to the communiqué. The Current Developments section also includes an article by David Simon on American cases and legislation from June 1, 1981 to July 31, 1983, on Taiwan's exports to the United States.

Mitchell A. Silk authored the fourth article, entitled *Imperial China and International Law: A Case Study of the 1895 Treaty of Shimonoseki*. The study presents an interesting analysis of China's exposure to Western international law during the Ch'ing dynasty.

The section on Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, compiled by Hungdah Chiu, Rong-jye Chen and Tzu-wen Lee, was significantly expanded. It includes many documents relating to current issues, such as the Republic of China's membership in the Asian Development Bank, the self-executing question of the Sino-American Treaty of Friendship, Commerce and Navigation before the ROC courts (the *Apple Computer II* cases), the capacity of an unapproved foreign corporation to sue before an ROC court, the bilateral application of certain international maritime conventions between the ROC and other countries and the extraterritorial effects of the ROC Law of National Compensation.

Like volume 1, this volume contains reviews of books published in Taiwan, lists of official and unofficial agreements concluded by the ROC and its semi-official organs (including the text of agreements concluded between the Coordination Council for North American Affairs and the American Institute on Taiwan), a list of foreign diplomatic, official (but not diplomatic) and semi-official organs on Taiwan, and basic statistical information on the Republic of China.

The publication is very useful because since 1972 most agencies of the United Nations have ceased to report on the activities of the Republic of China, despite the fact that Taiwan ranks 17th among the world's most active trading countries (seventh in its trade with the United States) and its activities involve many delicate problems of international law. The *Chinese Yearbook of International Law and Affairs* will clearly prove of great

value to those interested in international legal problems relating to East Asia.

SHAO-CHUAN LENG
University of Virginia

BRIEFER NOTICES

Deutsche Landesreferate zum Öffentlichen Recht und Völkerrecht. (XI. Internationaler Kongress für Rechtsvergleichung, Caracas 1982.) Edited by Rudolf Bernhardt and Ulrich Beyerlin. (Heidelberg: C.F. Müller Juristischer Verlag, 1982. Pp. xii, 283. DM 118.) This volume contains the German presentations at the 11th International Congress of Comparative Law held in Caracas in 1982.¹ While most items relate strictly to comparative law, there are two international law papers, one on the settlement of boundary disputes and one on comparative law and the international law of human rights. The latter, by Georg Ress, has interesting data as to the use by the German Constitutional Court and the European Court of Human Rights of comparative methods in judging whether such practices as capital punishment and the prohibition of abortion meet international minimum standards. Most of those courts' references are to other European, and occasionally American, materials since, although those states have long since been outnumbered in the United Nations, they still look to the practices of members of the club to find a minimum standard.

DETLEV VAGTS
Board of Editors

Judicial Protection in the European Communities (3d ed.). By Henry G. Schermers. (Deventer: Kluwer, 1983. Pp. xvi, 495. Index. Dfl.85; \$34.) Professor Schermers has published the third edition of his treatise on the nature of judicial protection within the European Communities. This edition follows the same schema adopted in the 1976 and 1979 editions. The book is divided into five chapters, the first two dealing with the Community's legal order, the last three treating the role and functioning of the Court of Justice and the national courts within that legal order. The last of these three chapters deals specifically with the procedures before the Court of Justice.

The current volume differs from the other leading works by Schermers, *Judicial Remedies in the European Communities* and *Leading Cases and Materials on the Law of the European Communities*, where a casebook approach, with minimal commentary, was used to clarify Community law. The present study is, on the other hand, presented as a systematic arrangement of and commentary on Community law as it has developed in the case law. Cases are quoted from by way of illustration. In this study, the author limits himself to a description of the law as it stands, rather than expressing an opinion of how it should be. Schermers warns that his reliance on case law leads to a certain imbalance, since in the little more than 25 years of case law certain branches of law have drawn more judicial attention than others. It is important to recall that this treatise is not a summary of

¹ For a review of the *Reports to the 10th Congress*, see 77 AJIL 962 (1983).

Community law on any particular issue and certainly not in general; it is, rather, a good overview of the judicial process of the Community in action. The sources of law, especially the Court's role in developing the law through judicial review, is Schermers's principal theme. He does a very good job of exploring it.

The third edition of Schermers's *Judicial Protection* is current up to December 31, 1982.

THAD W. SIMONS, JR.
Brussels

Der Urheberschutz der ausübenden Künstler und der Tonträgerproduzenten in den USA. By Beatrice Wagner-Silva Tarouca. (Munich: C.H. Beck'sche Verlagsbuchhandlung, 1983. Pp. xxiv, 176. DM 88.) This paperback book is one of a series from the Max Planck Institute of Munich, West Germany. The scholarly and thorough work discusses the U.S. copyright history, principles and cases, particularly those concerning artistic and musical works. Wagner-Silva Tarouca begins with the English Statute of Anne in 1709, which first mentions the idea of protection for published works, and continues the analysis through the present Copyright Act of 1976 and the several international conventions on copyright.

The interaction between the "monopoly" grant of a copyright and competition policy is explored, since free competition is a professed goal of the United States. Wagner-Silva Tarouca builds upon the foundation laid by this approach by then examining the particular areas of copyrights for artistic and musical works. Conflicts between the competition policy and the purposes for copyright protection in the two mentioned areas naturally evolve, providing the springboard for various legislative attempts in the United States over the years to satisfy the proponents of the two issues.

Much of the book is devoted to the recording industry and the increasing problems of piracy of recorded musical works. Wagner-Silva Tarouca discusses the major cases as well as the strategies of copyright infringement and unfair competition. The federally preempted common law copyright and the state issues concerning unauthorized musical recordings are reviewed since the 1976 Copyright Act mandated a different approach against the record pirates.

The differences in copyright-type protection between countries is most evident in the treatment of artistic or musical works. Wagner-Silva Tarouca develops these differences in approach to artistic and musical protection between the United States and the European countries only with respect to Germany.

The main contribution of this work lies in the complete bibliography of materials that touch upon copyrights of artistic and musical works. As a whole, the book is a useful publication to the legal scholar dealing with U.S. copyright law and the rights particularly that have been extended to artistic and musical works.

THOMAS F. MARSTELLER, JR.
Of the Texas Bar

International Organizations and Outer Space Activities. By Andrzej Górbiel. (Łódź: Redakcja Naczelna, Uniwersytet Łódzki, 1984. Pp. 117.) Andrzej Górbiel, professor of international law at the University of Łódź and a Polish representative at the Legal Sub-Committee of the UN Committee on the Peaceful Uses of Outer Space, believes that international cooperation in outer space activities will be facilitated through the effective use of international organizations. The presence of such bodies, in his view, will be particularly beneficial to states that lack advanced science and technology and possess limited financial resources. This will depend on the implementation of Article 1, paragraph 1 of the 1967 Outer Space Treaty. It ordains that "[t]he exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of mankind."¹

The author, in four of the six chapters, has summarized the constitutional powers of the principal international intergovernmental organizations involved in space activities. Reference is made to Intersputnik and to Intercosmos, as well as to nongovernmental bodies.

The survey does not offer information on or insights into the most effective means open to such institutions, which would allow them to realize their several goals. The author does, however, accept the view, which has sometimes been contested or circumscribed by Soviet jurists, that public international organizations possess a legal personality and can enjoy substantial rights and duties. He concludes by urging that a universal international organization charged with the general coordination and harmonization of all international outer space activities be established, in order to overcome current decentralizing tendencies.

CARL Q. CHRISTOL
University of Southern California

Legislación referente a la Protección y Preservación del Pacífico Sudeste contra la contaminación proveniente de fuentes terrestres. (Quito: Comisión Permanente del Pacífico Sur, 1982. Pp. 146.) This is a report on a seminar jointly organized by the Comisión Permanente del Pacífico Sur—a regional organization made up of Colombia, Chile, Ecuador and Peru—and the United Nations Environment Programme in Quito, Ecuador, in September 1982. The objective of the seminar was to examine the variety of legal procedures that are available to protect the maritime environment against pollution originating from land sources.

The first half of the report provides background information on the causes and consequences of pollution along the Pacific coast of Latin America and on the various international and regional initiatives taken to deal with the problem. The second half of the report consists of five studies that describe in detail how ocean pollution is tackled in the domestic legislations of Colombia, Chile, Ecuador, Peru and Panama.

¹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 UST 2410, TIAS No. 6347, 610 UNTS 205.

This report contains information that should prove invaluable, not only to those working on matters relating to the law of the sea and the environment, but also to the student of comparative law.

JULIO FAUNDEZ
University of Warwick

El Control de las Empresas Multinacionales. By Antonio Fernández Tomás. (Madrid: Editorial Tecnos, 1983. Pp. 311.) This book is made up of two self-contained parts plus a general introduction. Part I describes in detail the legal framework of foreign investment in Spain, focusing on legislative changes that have taken place since 1974. Special reference is made to the administrative procedures employed in Spain to regulate foreign investment. Part II deals with the transfer of technology and the multinational enterprise. This part has a more international flavor, as the author explains the Spanish approach to this problem from a comparative law perspective, taking into account developments in the Andean Pact and in several Latin American countries, as well as the work of UNCTAD on the Code of Conduct.

The title of the book is deceptive, for while the book provides a competent explanation of two important aspects of Spain's foreign investment legislation, it does not deal with the broader aspect suggested by its title: the control of the activities of multinational enterprises. The introduction to the book actually contains an excellent and brief explanation of the distinctive features of the multinational enterprise as a type of foreign direct investment. However, the actual legal analysis of the book is so formalistic that the reader is left wondering whether the author really believes that the control of multinational enterprises poses a new and difficult problem to nation-states. The book has no hard data on recent changes in the flow of foreign investment to and from Spain and provides no hint as to how Spanish membership in the EEC might affect the existing legal framework.

JULIO FAUNDEZ
University of Warwick

CORRECTION

Because of an editing error, two words were deleted from Richard Szawlowski's review of Voelkerrecht. *Lehrbuch*, which appeared in the April 1984 issue of the *Journal*, at p. 511. The sentence should have read: "In volume II, pp. 82-83, it is astonishing to read that the 1955 Warsaw Treaty provides for an automatic extension, each time, of a further 10 years unless the contracting parties give notice of termination one year in advance."

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* Mention here neither assures nor precludes later review.

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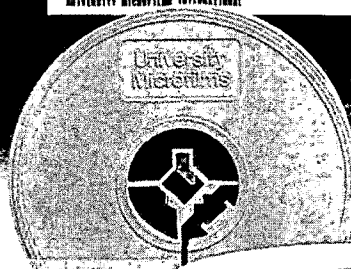
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